No. 07-7577

THE SUPREME COURT OF THE UNITED STATES

Brian T. O'Maley,
Petitioner

v.

The State of New Hampshire,
Respondent

On Petition For Writ Of Certiorari
To The New Hampshire Supreme Court

BRIEF IN OPPOSITION FOR THE STATE OF NEW HAMPSHIRE, RESPONDENT

THE STATE OF NEW HAMPSHIRE

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QUESTION PRESENTED

Whether the New Hampshire Supreme Court correctly determined that blood sample collection forms documenting information about the technician who drew the blood and the draw itself, and blood tests relied on by a testifying scientist are not testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 126 S. Ct. 2266 (2006).

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STATEMENT OF THE CASE

On August 1, 2005, the then seventeen-year-old petitioner, Brian T. O'Maley, injured his head and severely damaged his father's vehicle when he crashed the vehicle into a telephone pole and mailbox post on Mammoth Road in Derry, New Hampshire. *State v. O'Maley*, 932 A.2d 1, 4 (N.H. 2007); App. A.[1] Police officers later located O'Maley and the damaged vehicle at O'Maley's parents' home. *O'Maley*, 932 A.2d at 4. Both officers who spoke to O'Maley detected an odor of an alcoholic beverage emanating from him, and O'Maley admitted that he had been drinking and driving. *Id.* O'Maley was arrested for driving while impaired (DWI). *O'Maley*, 932 A.2d at 4. *See* N.H. Rev. Stat. Ann. § 265:82 (2004) (repealed 2006 and replaced by N.H. Rev. Stat. Ann. § 265-A:2 (Supp. 2007)); N.H. Rev. Stat. Ann. § 265:82-b (Supp. 2006) (repealed 2006 and replaced by N.H. Rev. Stat. Ann. § 265-A:18 (Supp. 2007)).

O'Maley was taken by ambulance to a hospital for treatment. *Id.* While he was there, an officer reviewed an administrative license suspension (ALS) form with O'Maley and his parents and then O'Maley consented to have his blood drawn for an alcohol concentration test. *Id.* A hospital medical technician drew a blood sample and completed a blood sample collection form. *Id.* The information on the form included the technician's name, title, and employer, and the type of non-alcoholic cleanser used to clean the area from which the blood was taken. *Id.* It also stated that the blood was

[1] "App. A" through "App. E" refer to the appendices to the Petition for Writ of Certiorari. "P" refers to the Petition for Writ of Certiorari.

being drawn "for the purpose of analysis as authorized under [N. H. Rev. Stat. Ann. §] 265:85, I [(2004) (repealed 2006 and replaced by N. H. Rev. Stat. Ann. § 265-A:5 (Supp. 2007))], and that the blood had been taken in accordance with New Hampshire Administrative Rule He-P 2002 [(now N.H. Admin. R. Saf-C 6402.2)]." *O'Maley*, 932 A.2d at 4.

An officer took O'Maley's blood sample to the police department where it was placed in a refrigerated locker. *Id.* (citing N.H. Admin. R. Saf-C 6402.6). It was then taken to the State of New Hampshire, Department of Safety, Division of State Police Forensic Laboratory (the State lab) for testing. *O'Maley*, 932 A.2d at 4. On August 16, 2005, an analyst tested the blood, and then "Dr. Michael Wagner, the assistant laboratory director, reviewed the test results, to ensure that both the sample and results complied with applicable administrative rules, and calculated the reported value of the blood test results." *Id.* (citing N.H. Admin. Rs. Saf-C 6402.11, 6402.12, 6402.14). Dr. Wagner later testified at trial that O'Maley's "blood alcohol content was .14 grams per one hundred milliliters or 'a .14.'" *O'Maley*, 932 A.2d at 4. "Neither the technician who drew the blood nor the analyst who originally tested it testified at trial." *Id.*

O'Maley appealed his conviction to the New Hampshire Supreme Court (the state court) arguing: (1) "that by allowing the blood sample collection form and Dr. Wagner's testimony about the blood test results to be admitted at trial, the trial court violated his rights under the State and Federal Confrontation Clauses"; and (2) "that admitting Dr. Wagner's testimony about the blood test results into evidence was error because the State failed to show that his blood was collected and tested in accord with applicable regulations." *Id.* On September 5, 2007, the state court affirmed the conviction in a three-to-two split decision. *Id.* The state court first ruled that "[b]y submitting the blood sample collection form, the State sufficiently proved that [O'Maley's] blood was collected in compliance with applicable regulations," and that "[w]hatever deficiencies or weaknesses there might have been in the State's proof of compliance with the regulations affected the weight of the evidence but did not determine its admissibility." *Id.* at 5-6 (quotations, citations, and brackets omitted). The state court then ruled that "[g]iven th[e] record, [it could] not conclude that the admission of the blood sample collection form and Dr. Wagner's testimony about the blood test results was harmless beyond a reasonable doubt." *Id.* at 6.

Because the state court was not able to resolve the appeal on non-constitutional grounds, it then addressed O'Maley's "claims under the State and Federal Confrontation Clauses." *Id.* It first held that because O'Maley had "failed to demonstrate that he raised a state constitutional issue in the trial court, . . . he ha[d] not preserved his State Confrontation Clause argument for appellate review." *Id.* It then ruled that neither the blood sample collection form nor the blood tests were "testimonial" as defined in *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 126 S. Ct. 2266 (2006).

On November 7, 2007, the instant petition for writ of certiorari was filed in this Court. On November 26, 2007, the State of New Hampshire waived its right to respond to the petition. However, on December 17, 2007, this Court requested that the State file a response or before January 16, 2008.

REASONS CERTIORARI SHOULD BE DENIED

Pursuant to Supreme Court Rule 10, a writ of certiorari will be granted only for compelling reasons that might include when a state court of last resort has decided an important federal question "that has not been, but should be, settled by this Court," or has decided the issue in a way that conflicts with decisions of either other state courts of last resort, a United States court of appeals, or this Court. Sup. Ct. R. 10. This Court should deny the petition in this case because it fails to establish a sufficiently developed lower court dispute on the issue at bar. Further, even if it did establish a sufficiently developed dispute, the New Hampshire Supreme Court's interpretation of the application of the holdings in *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 126 S. Ct. 2266 (2006), to scientific foundational evidence does not conflict with, and is a logical extension of, those decisions.

I. THE PETITION FAILS TO ESTABLISH THAT THERE IS A SUFFICIENTLY DEVELOPED LOWER COURT DISPUTE ABOUT THE ADMISSIBILITY OF FOUNDATIONAL SCIENTIFIC EVIDENCE IN THE WAKE OF *CRAWFORD* AND *DAVIS*.

O'Maley argues that this Court should grant the petition because there is a widely acknowledged, deep, and intractable three-way split over the question of whether statements concerning the collection or testing of forensic evidence made in anticipation of prosecution are "testimonial" under *Crawford* and *Davis*. P 12-16. However, most of the authority cited by O'Maley in support of that claim either predates *Davis* or did not take that decision into consideration, and a review of the decisions in *Crawford* and *Davis* demonstrates that *Davis* provided further clarification and guidance that the lower courts should take into consideration in determining when out-of-court statements are "testimonial."

"The Sixth Amendment's Confrontation Clause provides that, 'in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.'" *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (quoting U.S. CONST. amend. VI) (brackets and ellipsis omitted). "[T]his bedrock procedural guarantee applies to both federal and state prosecutions." *Crawford*, 541 U.S. at 43. Prior to this Court's decision in *Crawford*, it had long held that a defendant's federal right to confrontation "d[id] not bar admission of an unavailable witness's statement against a criminal defendant if the statement b[ore] 'adequate indicia of reliability.'" *Crawford*, 541 U.S. at 43 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). "To meet that test, evidence [had to] either fall within a 'firmly rooted hearsay exception' or bear 'particularized guarantees of trustworthiness.'" *Crawford*, 541 U.S. at 43 (quoting *Roberts*, 448 U.S. at 66).

In *Crawford*, this Court rejected the *Roberts* test, but then stated:

> 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—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Crawford, 541 U.S. at 68.

In *Crawford*, the defendant claimed that he acted in self-defense. *Id.* at 40. Mrs. Crawford claimed a marital privilege and was unavailable for trial, but her tape-recorded statement to the police describing the stabbing was admitted pursuant to "the hearsay exception for statements against penal interest." *Id.* at 38, 40. Crawford argued that admission of the tape violated his right to confront the witnesses against him, and that the *Roberts* test "stray[ed] from the original meaning of the Confrontation Clause . . . ." *Id.* at 42. This Court found that "[t]he common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers," and that "England at times adopted elements of the civil-law practice." *Id.* at 43. It then traced the history of the controversial practice of convicting and condemning persons based on statements made in pretrial *ex parte* examinations of witnesses who were not present at trial. *Id.* at 43-45. It found that because that practice continued in the colonies, many states, after independence, including New Hampshire and Massachusetts, adopted declarations of rights that guaranteed a right of confrontation, and that the First Congress eventually "include[ed] the Confrontation Clause in the proposal that became the Sixth Amendment." *Id.* at 48. A majority of early state decisions had then held that depositions could be admitted at trial only if they had been taken in the defendant's presence with an opportunity for cross-examination. *Id.*

This Court concluded that its historical analysis supported the proposition that "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." *Id.* It found "that not all hearsay implicate[d] the Sixth Amendment's core concerns," and then said:

> 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. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it.

Id. at 51-52 (internal quotations, citations, and ellipsis omitted).

This Court then found that its historical analysis also supported the proposition that "the right to be confronted with the witnesses against him, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Id.* at 54 (quotations and citations omitted). It stated that hearsay exceptions that were well established by 1791 "covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy." *Id.* at 56. This Court then said that it would "leave for another day any effort to spell out a comprehensive definition of 'testimonial,'" but that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68. It concluded that Mrs. Crawford's statements made in response to police interrogation at the police station were "testimonial." *Id.*

In *Davis v. Washington*, 126 S. Ct. 2266 (2006), this Court again declined to "produce an exhaustive classification" of testimonial statements, but did provided further guidance and clarification when it held:

> Statements are nontestimonial when 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. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 126 S. Ct. at 2273-74.

In *Davis*, statements made by the victim, McCottry, to a 911 emergency operator were admitted after McCottry did not appear at trial. *Id.* at 2270-71. This Court found that the initial statements were not "testimonial" because "the circumstances of McCottry's interrogation objectively indicate[d] its primary purpose was to enable police assistance to meet an ongoing emergency," and therefore she "was not acting as a *witness*; she was not *testifying*." *Id.* at 2277. It then found that later statements made by McCottry in response to questioning after the emergency had ended "were testimonial, not unlike the 'structured police questioning' that occurred in *Crawford* . . . ." *Id.* (citation omitted).

In the companion case, *Hammon v. Indiana*, statements made by the alleged victim, Amy, in response to questions by an officer responding to her home to investigate a domestic assault, were admitted at trial after she failed to appear. *Davis*, 126 S. Ct. at

2272. This Court ruled that the statements were "inherently testimonial" where "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime," and where Amy had responded to police questioning about how "criminal past events began and progressed" after she had been separated from her husband and "after the events described were over." *Id.* at 2278. Therefore, *Davis* clarified aspects of the *Crawford* decision and also introduced another factor—the circumstances under which the statement was made—that courts should consider in determining whether out-of-court statements are "testimonial."

In making his claim that "there is a deep and intractable three-way split over the Question Presented by this case," O'Maley cites to decisions from five state courts of last resort that have adopted a bright line test that looks only at whether the out-of-court statements were created for later use in a prosecution. P 12 (citing *Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo. 2007); *Roberts v. United States*, 916 A.2d 922 (D.C. 2007); *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006); *State v. March*, 216 S.W.3d 663 (Mo. 2007), *petition for cert. filed*, 76 U.S.L.W. 3001 (June 18, 2007) (No. 06-1699);[**] *City of Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005), *cert. denied sub nom, Gehner v. City of Las Vegas*, 547 U.S. 1071 (2006)). He also cites decisions from three state courts of last resort and one federal circuit court of appeals that have adopted a bright line test that looks only at whether the out-of-court statements constitute business or public records. P 15 (citing *United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006); *Commonwealth v. Verde*,

[**] The petition was dismissed pursuant to U.S. Sup. Ct. R. 46 on October 5, 2007.

444 Mass. 279, 827 N.E.2d 701 (2005); *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137, *cert. denied*, 127 S. Ct. 557 (2006); *Commonwealth v. Carter*, 932 A.2d 1261 (Pa. 2007)).

O'Maley further cites to decisions of two other courts that, like the state court here, have "refused to use a categorical approach to resolve the Question Presented." P 14 (citing *People v. Geier*, 41 Cal. 4th 555, 61 Cal. Rptr. 3d 580, 161 P.3d 104 (2007), *petition for cert. filed* (Jan. 14, 2007) (No. 07-7770); *State v. Dedman*, 136 N.M. 561, 102 P.3d 628 (2004)). He then cites to the decision of one circuit court of appeals that has "held that blood toxicology results generated by chromatograph operated by non-testifying technicians do not implicate *Crawford* at all" because they are not generated by a person, and thus cannot be statements under the Federal Rules of Evidence. P 16 (citing *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007), *petition for cert. filed* (Dec. 14, 2007) (No. 07-9291)). That court also held that the blood toxicology results were not "testimonial" because they "relate solely to the *present condition* of the blood without making any links to the past," and "did not look forward to 'later criminal prosecution' . . . ." P 16. Those cases do not support O'Maley's claim that there is a sufficiently developed split of authority.

Of the eleven decisions cited by O'Maley in support of that claim, four were decided prior to *Davis*. *See Verde*, 444 Mass. at 282-85, 827 N.E.2d at 704-06; *Walsh*, 124 P.3d at 207-08*; Dedman*, 136 N.M. at 568-69, 102 P.3d at 635-36; *Forte*, 360 N.C. at 433-37, 629 S.E.2d at 142-44. Two were decided after *Davis*, but did not take into consideration the clarification and guidance provided by this Court in that decision. *See*

Hinojos-Mendoza, 169 P.3d at 666-67; *Caulfield*, 722 N.W.2d at 308-10. And one held that *Crawford* was inapplicable and then decided the issue under *Roberts*. *See Carter*, 932 A.2d at 1265 n.3. Therefore, the petitioner has cited only four cases other than his own in which a state court of last resort or a federal circuit court of appeals has decided the issues at bar or issues similar to the issues at bar by applying the guidance and clarification provided by this Court in *Davis*. *See Washington*, 498 F.3d at 232 ("As the machine's output did not 'establish or prove past events' and did not look forward to 'later criminal prosecution,' . . . the output could not be 'testimonial'") (quoting *Davis*, 126 S. Ct. at 2273-74); *Ellis*, 460 F.3d at 926 (*Davis* "necessarily rejects a strict adherence to denominating as testimonial all statements made under circumstances where a reasonable person would know the statements might be used as evidence of a crime"); *Geier*, 41 Cal. 4th at 607, 61 Cal. Rptr. 3d at 621, 161 P.3d at 140 ("under *Davis*, determining whether a statement is testimonial requires [the court] to consider the circumstances under which the statement was made . . . . the crucial point is whether the statement represents the contemporaneous recordation of observable events"); *Roberts*, 916 A.2d at 937-40 (relying on *Thomas v. United States*, 914 A.2d 1, 12 (D.C. 2006), *cert. denied*, 128 S. Ct. 241 (2007), which had applied "the 'primary purpose' test employed in *Davis*").

Furthermore, *O'Maley* relied in large part on *Geier*, and the decisions in the other post-*Davis* cases that actually took *Davis* into consideration either did not address the same issues raised and decided in *O'Maley* and *Geier* or they were factually distinguishable from those cases. In both *O'Maley* and *Geier*, an expert witness had reviewed the contemporaneous notes of other analysts who had performed certain tests, had signed the certificate of analysis with the final reported results, and had then testified that, based on their review of the other analysts' notes, they had concluded that the foundational requirements had been met, and that they had reached a conclusion about the evidence that was based, at least in part, on the tests run by the other analysts. *Geier*, 41 Cal. 4th at 594-95, 61 Cal. Rptr. 3d at 611-12, 161 P.3d at 131-32; *O'Maley*, 932 A.2d at 5. Further, in *O'Maley*, a blood sample collection form filled out by a hospital technician was admitted at trial through a police officer in order to establish the foundation required for the admission of the blood test results under New Hampshire's Administrative Rules. *O'Maley*, 932 A.2d at 13.

In contrast, in *Washington*, the court held that raw data from a computer printout that was relied on by an expert witness could not be "testimonial" because "raw data generated by the machines do not constitute 'statements,' and the machines are not 'declarants,'" but it declined to address whether statements by nontestifying witnesses that were used only to establish the foundation for such evidence would be "testimonial." *Washington*, 498 F.3d at 231. In *Roberts*, the court held that conclusions reached by nontestifying analysts were "testimonial" because they were created for use in a criminal prosecution by agents of law enforcement and admitted through the testifying expert as substantive evidence, but it left open the question of whether such records were nontestimonial when they were admitted solely as a part of the basis for the expert's opinion. *Roberts*, 916 A.2d at 938-39.

In *March*, the court considered only whether the results of a forensic analysis admitted through the custodian of the laboratory's record, rather than through a testifying expert, were testimonial, and determined that they were because they were "prepared solely for prosecution to prove an element of the crime charged." *March*, 216 S.W.3d at 664, 666. In *Ellis*, the court determined that certified copies of the results of blood and urine tests introduced under the business records exception and the certificate of authentication admitted as a foundation for those records, which were both admitted through the arresting officer, were not testimonial because the medical professionals who wrote them "were employees simply recording observations which, because they were made in the ordinary course of business, are 'statements that by their nature were not testimonial.'" *Ellis*, 460 F.3d at 926-27 (quoting *Crawford*, 541 U.S. at 56). Therefore, O'Maley's allegation that there is a conflict that should be resolved by this Court is illusory because there has been insufficient time since this Court's decision in *Davis* for the issues presented in this appeal to develop in the lower courts, and because the cases that have taken *Davis* into consideration either did not address the same issues raised in *O'Maley* and *Geier* or were factually distinguishable from those cases. Accordingly, because not enough lower courts have weighed in on these issues since *Davis*, they are not yet ripe for review by this Court.

II. THE NEW HAMPSHIRE SUPREME COURT'S DECISION DOES NOT CONFLICT WITH, AND IS A LOGICAL EXTENSION OF, THIS COURT'S DECISIONS IN *CRAWFORD AND DAVIS.*

In *O'Maley*, the state court reviewed O'Maley's claims under the Federal Confrontation Clause, and found that neither the blood sample collection form nor the blood tests admitted through the expert witness were testimonial under this Court's holdings in *Crawford* and *Davis*. *O'Maley*, 932 A.2d at 13-15. In reaching that conclusion, the state court examined the history of this Court's Confrontation Clause jurisprudence, the decisions of courts in other jurisdictions that had formulated various tests for determining whether reports of scientific analysis were testimonial in the wake of *Crawford* and *Davis*, and then rejected those tests and formulated its own three-part test, which was based, in part, on the different three-part test announced in *Geier*. *O'Maley*, 932 A.2d at 7-13 (citing *Geier*, 41 Cal. 4th at 605-06, 61 Cal. Rptr. 3d at 620-21, 161 P.3d at 138-40).

The petitioner alleges that in *O'Maley*"[t]he majority adopted the three-part *Geier* test, but not before adding two further requirements for a statement to be 'testimonial.'" P 10. However, under *Geier*, "a statement 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 later use at a later trial date." *Geier*, 41 Cal. 4th at 605, 61 Cal. Rptr. 3d at 620, 161 P.3d at 138. In contrast, under the *O'Maley* test, "the circumstances under which an out-of-court statement is generated is the 'critical inquiry.'" *Id.* at 12 (quoting *Geier*, 41 Cal. 4th at 607, 61 Cal. Rptr. 3d at 621, 161 P.3d at 140). "[A] crucial factor in determining whether a statement is testimonial or not is whether it represents 'the documentation of past events' or 'the contemporaneous recordation of observable events.'" *O'Maley*, 932 A.2d at 12 (quoting *Geier*, 41 Cal. 4th at 605, 61 Cal. Rptr. 3d at 620, 161 P.3d at 139). "[T]wo other factors are also important; the first is whether the statement was prepared in a manner resembling *ex parte* examination." *O'Maley*, 932 A.2d at 12. "The second . . . is whether the statement is an accusation." *Id.* Therefore, the *O'Maley* test is not a five-part test that incorporates the three-part test announced in *Geier*.

In *O'Maley*, after formulating the foregoing test, the state court first analyzed whether the blood sample collection form was testimonial and held:

> The blood sample collection form did not accuse [O'Maley] of any wrongdoing. It merely gave information about the technician who withdrew the blood and about the draw itself. Nor did the form describe any of [O'Maley's] past conduct. Rather, it constituted the technician's contemporaneous recordation of observable events. The technician filled out the blood sample collection form at the same time or shortly after she drew [O'Maley's] blood. Further, the information supplied on the form was not requested by law enforcement, but was required by pertinent administrative rules. Moreover, the technician's statements on the blood sample collection form were not a weaker substitute for live testimony at trial. If the technician had been called to testify at trial, she would merely have authenticated the document. Although she signed the blood sample collection form, she likely would be unable to recall from actual memory information related to its specific contents and would rely instead upon the record of her own action.
>
> The blood sample collection form is, thus, unlike the categories of statements that the Court defined as unquestionably testimonial. It bears little resemblance to the civil-law abuses the Confrontation Clause targeted. We hold therefore, that it is not testimonial within the meaning of *Crawford* and *Davis*.

Id. at 13 (internal quotations, citations, ellipsis, and brackets omitted).

The state court next analyzed whether the blood tests and the results of those tests were testimonial, and held:

> Unlike most of the cases involving laboratory reports, the blood tests at issue here were *never* offered or admitted into evidence. The only evidence of [O'Maley's] blood alcohol content came from Dr. Wagner's testimony regarding the final reported result, which he prepared. None of the raw data from which he derived this result were admitted into evidence. We conclude that, in this case, permitting Dr. Wagner to give his opinion of the test results, absent the testimony of the analyst who conducted the test, did not violate [O'Maley's] Confrontation Clause rights because the tests were not testimonial.
>
> The results generated from the blood test were neutral, as the tests could have led either to incriminatory or exculpatory results. Moreover, to the extent that the actual reported test result is deemed to be accusatory, this result was reached and conveyed not through the nontestifying analyst's report, but by Dr. Wagner, the testifying witness. Under New Hampshire regulations, the reported value of the blood sample is determined by averaging the value of two replicate tests and rounding to the second decimal place. Dr. Wagner testified that he personally prepared this analysis. Further, had the analyst appeared at the hearing, she would almost certainly not remember her performance of the specific test of [O'Maley's] blood months later. Her testimony would have been nearly identical to that of Dr. Wagner as it would concern her general knowledge of the State Laboratory's test procedures and protocols, quality control measures, specific levels of review and chain of custody matters. Given these circumstances, we conclude that the blood tests were not testimonial.

Id. at 13-14 (internal quotations, citations, ellipsis, and brackets omitted).

The state court then held that although it had previously "set forth a two-step analysis under which [it would] apply *Roberts* to out-of-court statements that are not testimonial," it would not do so in this case because this Court had later "clarified that the Federal Confrontation Clause applies *only* to out-of-court statements that are testimonial," and because O'Maley had "ma[de] no argument under *Roberts*." *Id.* at 14. The state court then concluded: "[T]he blood sample collection form and blood tests upon which Dr. Wagner based his testimony are not testimonial hearsay under *Crawford* and *Davis*." *Id.* "The admission of the form and Dr. Wagner's testimony, absent the testimony of the technician who drew the defendant's blood or the analyst who tested it, did not violate the Federal Confrontation Clause." *Id.* That opinion is consistent with, and a logical extension of, this Court's decisions in *Crawford* and *Davis*.

In *Crawford*, Mrs. Crawford claimed a marital privilege and was unavailable for trial, but her tape-recorded statement to the police describing the stabbing was admitted pursuant to "the hearsay exception for statements against penal interest." *Crawford*, 541 U.S. at 38, 40. In *Davis*, statements made by the victim, McCottry, to a 911 emergency operator were admitted after McCottry did not appear at trial. *Davis*, 126 S. Ct. at 2270-71. In *Hammon*, statements made by the alleged victim, Amy, in response to questions by an officer responding to her home to investigate a domestic assault, were admitted at trial after she failed to appear. *Davis*, 126 S. Ct. at 2272. Therefore, in each case, the statements at issue had been made by a "witness" during the course of police interrogation, the primary purpose of which was "to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 126 S. Ct. at 2273-74.

Here, although the purpose of testing O'Maley's blood was to prove that he drove while intoxicated in the past for the purpose of a later criminal prosecution, the statements were not those of a witness to the crime or someone with knowledge of the crime itself. Instead, they were statements by hospital and laboratory personnel who were simultaneously recording their actions for the sole purpose of documenting those actions. Further, those statements were not substantive evidence of the crime itself, but rather statutory foundational requirements for admitting results generated by a machine. A machine is not a "witness" or a "declarant" and therefore cannot "bear testimony." *See Crawford*, 541 U.S. at 51 ("witnesses" are "those who 'bear testimony'"); *see also Washington*, 498 F.3d at 230 (raw data generated by a lab's machines were not hearsay statements because under Federal Rule of Evidence 801(c), "hearsay" is "'a statement, other than one made by the declarant while testifying at the trial of hearing, offered in evidence to prove the truth of the matter asserted,'" under Federal Rule of Evidence 801(b), a "'declarant' is a *person* who makes a statement,'" and under Federal Rule of Evidence 801(a), a "statement" must be made by a "*person*"); *accord* Ly *v. State*, 908 S.W.2d 598, 600 (Tex. App. 1995). Therefore, the statements at issue here were not at all similar to those being considered in *Crawford* and *Davis*.

The statements at issue here also were not "prior testimony at a preliminary hearing, before a grand jury, or at a former trial." *Crawford*, 541 U.S. at 68. Therefore, the state court's ruling that the blood sample collection form and blood tests and results were not testimonial, and therefore that their admission did not violate O'Maley's rights under the United States Constitution, was not in conflict with, and was a logical extension of, *Crawford* and *Davis*. Accordingly, the state court's ruling does not warrant this Court's review by a writ of certiorari.

CONCLUSION

For the foregoing reasons, the respondent respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the New Hampshire Supreme Court in *State v. O'Maley*, 932 A.2d 1 (N.H. 2007).

Respectfully submitted,

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