No. 07-_____

IN THE SUPREME COURT OF THE UNITED STATES

BRIAN T. O'MALEY, PETITIONER

v.

THE STATE OF NEW HAMPSHIRE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW HAMPSHIRE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the Court with an ideal opportunity to resolve an important question of constitutional criminal procedure that has resulted in a widely acknowledged and intractable 5-4-4 split among 13 state courts of last resort and federal courts of appeals. The Question Presented is:

Whether hearsay statements regarding the collection or testing of forensic evidence made in anticipation of prosecution are "testimonial" and, therefore, subject to the Confrontation Clause demands enunciated in Crawford v. Washington, 541 U.S. 36 (2004).

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Brian T. O'Maley respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of New Hampshire in this case.

OPINION BELOW

The precedential opinion of the Supreme Court of New Hampshire (App., infra, 1a-22a) is reported at 932 A.2d 1.

JURISDICTION

The judgment of the Supreme Court of New Hampshire was entered on September 5, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused

shall enjoy the right * * * to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor."

STATEMENT OF THE CASE

A. Legal and Factual Background

1. The scientific testing of forensic evidence plays a central (and often pivotal) role in millions of criminal cases every year. To establish the presence or quantity of an illegal substance, that a particular instrument was used to commit a certain crime, or that a particular individual committed a certain offense, prosecutors almost invariably rely on forensic evidence.

Whenever the prosecution wishes to introduce the results of testing of such evidence, it has the burden of proof on two extremely important evidentiary issues. First, the prosecution must establish that the forensic evidence was properly collected and maintained prior to any scientific testing. Second, the prosecution must establish that the actual testing of the forensic evidence was done properly. The prosecution bears the burden on these two evidentiary issues for an obvious reason: the probative value of the scientific analysis presupposes that the individuals who collected and tested the evidence did so properly.

The vast majority of jurisdictions now allow prosecutors to introduce the results of scientific analysis without presenting any testimony by those individuals who collected or tested the evidence. Often this is done through exceptions to the rule against hearsay – such as a "business record" exception, a "public record" exception, see, e.g., Pamela R. Metzger, Cheating the Constitution, 59 Vand. L. Rev. 475, 508 & n.164 (2006), or some other specific statutory exception.[1] In other cases, this is done by using an expert's prerogative to rely on, and relate to the fact-finder, otherwise inadmissible hearsay. See, e.g., Paul C. Giannelli, Expert Testimony and the Confrontation Clause, 22 Cap. U. L. Rev. 45, 54-62 (1993) (detailing use of experts as "conduits" or a "back door" for otherwise inadmissible hearsay statements relating to forensic analysis) [hereinafter "Giannelli, Expert Testimony"].

All such exceptions to the rule against hearsay deny the accused any opportunity to confront the individuals who have collected or tested the forensic evidence that is

[1] Such statutory exceptions generally relate to a certain class of offenses or to certain classes of evidence frequently subject to forensic testing. See, e.g., Metzger, supra, at 478 & n.9 (collecting specific statutory exceptions to hearsay rule for the admission of forensic analysis reports).

being introduced at trial to establish guilt. As a result, the perceptions, memory, sincerity, and reliability of the persons who carried out the collection or testing evade cross-examination. Defendants are deprived of perhaps their only opportunity to "cut superficially impressive scientific evidence down to its proper size." 1 Kenneth S. Broun, McCormick on Evidence § 203 (6th practitioner ed. 2006) (stressing the importance of "[a]ttention to possible infirmities in the collection and analysis of data").

2. The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *." U.S. Const. amend. VI. Nonetheless, prior to this Court's landmark decision in Crawford v. Washington, 541 U.S. 36 (2004), an unavailable declarant was shielded from confrontation if his hearsay statement bore adequate "indicia of reliability," such as when it fell within a "firmly rooted hearsay exception." Ohio v. Roberts, 448 U.S. 56, 66 (1980). In Crawford, this Court returned Sixth Amendment jurisprudence to the plain meaning of the Amendment's text, concluding that "the only indicium of reliability sufficient to satisfy constitutional demands is

the one the Constitution actually prescribes: confrontation." 541 U.S. at 69.

Crawford prohibited the introduction of "testimonial" evidence against a criminal defendant when a declarant is unavailable at trial, unless the defendant had a prior opportunity for cross-examination. Id. at 54, 68. The Court, however, left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" Id. at 68. As a result, courts have struggled to determine when evidence is "testimonial" and have articulated different analyses yielding conflicting results in identical legal contexts.

Davis v. Washington, 126 S. Ct. 2266 (2006), resolved only part of the "testimonial" confusion engendered by Crawford. In Davis, this Court examined whether "excited utterances" to law enforcement personnel during a 911 call or at a crime scene were "testimonial." But the Court again declined "to produce an exhaustive classification of all conceivable statements * * * as either testimonial or nontestimonial." Id. at 2273.

This case poses ideal facts upon which to resolve the meaning of "testimonial" with respect to a near-routine part of criminal trials: the use of forensic evidence by the prosecution. Specifically, this case presents the

Court with the opportunity to articulate a test for determining to what extent, if any, hearsay statements relating to two elements of forensic proof – (1) the collection and chain of custody of forensic evidence and (2) the testing of forensic evidence – are "testimonial," such that the failure to present them through live testimony violates the Confrontation Clause.

B. Procedural History

1. Petitioner was convicted of DUI because his blood alcohol concentration (BAC) was above the legal limit. App., infra, 1a–2a; see N.H. Rev. Stat. §§ 265–A:2 (formerly § 265:82), 265–A:18 (formerly § 265:82–b). To establish petitioner's guilt, the State offered into evidence at trial two sets of hearsay statements relevant here.

a. Statements Regarding Evidence **Collection**. To show that a sample of petitioner's blood "was taken * * * according to the procedures prescribed in the rules adopted by the * * * department of safety," the State sought the admission of a blood sample collection form (hereinafter, "Blood Collection Form") completed and signed

by the medical technician who drew petitioner's blood.[2] N.H. Rev. Stat. § 265-A:12(IV) (formerly § 265:90(IV)).

Instead of having the medical technician testify at petitioner's trial, the State moved for the form's admission during the testimony of the arresting police officer. Tr. 44-45. Petitioner objected, arguing that the form was "testimonial" under Crawford and could only be admitted if the State called the technician who actually drew petitioner's blood. Tr. 45-47. Although the State acknowledged that petitioner "makes a very good Crawford argument," id. at 51, the trial court denied petitioner's objection without explanation and admitted the Blood Collection Form into evidence, id. at 55.[3]

b. Statements Regarding Evidence **Testing**. To show that petitioner's BAC was above the legal limit, the State

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[2] The form is reproduced at App., infra, 24.

[3] Under New Hampshire law,

> [a] copy of the appropriate form filled out and signed by the person who took the sample for the alcohol concentration test * * * shall be admissible evidence that the sample was taken by such person at the stated time on the stated date according to the procedures prescribed in the rules adopted by * * * the department of safety.

N.H. Rev. Stat. § 265-A:12(IV) (formerly § 265:90(V)) (emphasis added); see also State v. Coombs, 821 A.2d 1030, 1031 (N.H. 2003) (noting that the then-§ 265:90 "creates an exception to the rule against hearsay").

sought to elicit the results of its forensic laboratory's testing of petitioner's blood (hereinafter, the "Blood Analysis").[4] Instead of having the technician who conducted the Blood Analysis testify at petitioner's trial, the State sought to introduce the Blood Analysis results through the testimony of Dr. Michael Wagner, the laboratory's assistant director, who certified – but did not perform – the Blood Analysis. See, e.g., N.H. S. Ct. Br. 4 (Ms. "Blais tested the sample * * * and determined the defendant's [BAC] had been .14. Dr. Michael Wagner * * * reviewed Blais's work and certified the results."); Tr. 68 (noting that petitioner's blood sample "was actually tested by * * * Robin Sweeney Blais").

Petitioner objected, arguing that because Dr. Wagner was "not the actual testing scientist," his testimony about the Blood Analysis results "clearly call[s] into question Crawford." Id. at 68. Although the State acknowledged that other courts were not permitting such individuals to testify, the State asserted that under § 265-A:12(I) (formerly § 265:90(I)), it was "only required to bring the

[4] N.H. Rev. Stat. § 265-A:2(I) (formerly § 265:82(I)) provides that a person is "under the influence of intoxicating liquor" if he has "an alcohol concentration of 0.08 or more or in the case of a person under the age of 21, 0.02 or more."

certifying scientist" to testify. Id. at 70. The trial court accepted the State's argument and denied petitioner's objection without explanation. See ibid. As a result, Dr. Wagner was permitted to testify that petitioner's BAC "was 0.14 grams per one hundred milliliters or 'a .14.'" App., infra, 2a; see also Tr. 76.

2. By a vote of 3 to 2, a divided New Hampshire Supreme Court affirmed the trial court's holding that neither the Blood Collection Form nor the results of the Blood Analysis were "testimonial" for purposes of the federal[5] Confrontation Clause. App., infra, 1a–15a (Maj. Op.).

Surveying case law from other jurisdictions, the majority noted that "in the wake of Crawford," state and federal courts around the country have articulated dramatically different tests for resolving, and have reached conflicting answers to, the Question Presented. Id. at 9a. The majority observed that one group of courts has "adopted a bright line test," under which certain evidence "– fingerprint analysis, autopsy reports, serology reports, drug analysis reports, DNA reports – [that] is prepared for possible use at a criminal trial * * * is

[5] See App., infra, 5a (expressly declining to resolve this case under the New Hampshire Constitution); see also infra, pg. 27.

testimonial and inadmissible unless the conditions for its admission, outlined in Crawford, have been met." Ibid. (collecting cases; citation omitted). In contrast, the majority noted, a second group of courts has "adopted a different bright line test," under which "laboratory reports and the like are not testimonial" when covered by an exception to the hearsay rule – e.g., a business records exception. Ibid. (collecting cases). The majority criticized both bright line tests as "rest[ing] upon a misinterpretation of Crawford" and adopted neither. Ibid.

Instead, the majority turned to a third solution articulated in People v. Geier, 161 P.3d 104 (Cal. 2007). See id. at 10a-11a. In that case, the California Supreme Court held that 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 use at a later trial." Geier, 161 P.3d at 138. The majority adopted the Geier test but not before adding two further requirements for a statement to be "testimonial:" (4) that the statement be "prepared in a manner resembling ex parte examination" and (5) that the statement be "accusatory." App., infra, 12a. Applying this test to the evidence at issue, the majority held that neither the Blood Collection Form nor the results

of the Blood Analysis was "testimonial" because, in its view, they represented "contemporaneous recordation[s] of observable events" and were "neutral," insofar as they "could have led to either incriminatory or exculpatory results." Id. at 13a–14a.

Justice Duggan, joined by Chief Justice Broderick, dissented. See id. at 15a–22a. In their view, the majority's test was unfaithful to Crawford; by "focus[ing] upon the content of the statements at issue * * * not * * * upon the process through which the statements were made," the majority disinterred the very foundational reliability analysis that Crawford eschewed. Id. at 18a. The better test for whether a statement relating to the collection or testing of forensic evidence is "testimonial," the dissent explained, asks if (1) the statement was made "at the request" of law enforcement and (2) the declarant would "reasonably have believed" that the statement "would be used" by law enforcement "to secure a conviction at a subsequent trial." Id. at 20a. The dissent concluded by specifically lamenting that this Court had not yet "modifie[d] or clarifie[d] Crawford, or chart[ed] a different course." Id. at 22a.

3. This petition followed.

REASONS FOR GRANTING THE PETITION

A. There Is a Widely Acknowledged, Deep, and Intractable Three-Way Split Over the Question Presented

As expressly recognized by both the majority and dissent below, there is a deep and intractable three-way split over the Question Presented by this case: whether hearsay statements regarding the collection or testing of forensic evidence made in anticipation of prosecution are "testimonial" and, therefore, subject to the Confrontation Clause demands enunciated in Crawford. See App., infra, 9a-12a (Maj. Op.) (characterizing the conflict); 19a-21a (Duggan, J., dissenting) (collecting cases).

1. One group of courts has answered the Question Presented with a categorical "yes." In the words of the New Hampshire Supreme Court majority, "some courts have adopted a bright line test [regarding] the availability of the out-of-court statements for later [use at] trial and concluded that" documents relating to or reporting the results of such forensic tests are "testimonial" because they are created for later use in prosecution. App., infra, 9a. Such a test has been adopted by five state courts of last resort. See Hinojos-Mendoza v. People, --- P.3d ---, 2007 WL 2581700, at *4-*5 (Colo. Sept. 10, 2007) (laboratory report identifying confiscated substance as

cocaine); Roberts v. United States, 916 A.2d 922, 938-39 (D.C. 2007) (DNA analysis by FBI forensic scientists offered through testimony of prosecution's DNA expert);[6] State v. March, 216 S.W.3d 663, 665-67 (Mo. 2007) (laboratory report identifying confiscated substance as cocaine base);[7] State v. Caulfield, 722 N.W.2d 304, 308-10 (Minn. 2006) (state forensic examiner's report identifying confiscated substance as cocaine); Las Vegas v. Walsh, 124 P.3d 203, 207-08 (Nev. 2005) (en banc) (affidavit from nurse who drew blood for later blood alcohol analysis), cert. denied, 547 U.S. 1071 (2006) (No. 05-1052).

2. A second group of courts has answered the Question Presented with a categorical "no." As explained by the New Hampshire Supreme Court majority, "[o]ther courts have developed a different bright line test," concluding that "laboratory reports and the like are not

[6] Roberts followed and expanded upon the District of Columbia Court of Appeals' prior decision in Thomas v. United States, 914 A.2d 1, 11-20 (D.C. 2006), cert. denied, --- S. Ct. ---, 2007 WL 2005554 (Oct. 01, 2007) (No. 07-5053), which held that a report containing both chain-of-custody information and the results of a chemical analysis identifying a confiscated substance as cocaine was "testimonial."

[7] The State of Missouri petitioned for certiorari in March, No. 06-1699. While the petition was pending, the defendant pled guilty to the underlying offense and mooted the case. Accordingly, this Court dismissed the petition under Rule 46 on October 5, 2007.

testimonial" because they constitute business or public records. App., infra, 9a. (emphasis added). This test has been adopted by three state courts of last resort and one federal court of appeals. See United States v. Ellis, 460 F.3d 920, 926-27 (CA7 2006) (report containing chain-of-custody information and results of police-directed blood test establishing presence of drugs in defendant's system); Commonwealth v. Carter, --- A.2d ---, 2007 WL 3015622, at *6 (Pa. Oct. 17, 2007) (laboratory report identifying confiscated substance as cocaine); State v. Forte, 629 S.E.2d 137, 142-44 (N.C. 2006) (DNA analysis), cert. denied, 127 S. Ct. 557 (2006) (No. 06-6282); Commonwealth v. Verde, 827 N.E.2d 701, 705-06 (Mass. 2005) (certificates of analysis showing drug weight).

3. A final group of courts, including the New Hampshire Supreme Court in this case, has refused to use a categorical approach to resolve the Question Presented. These courts, however, have struggled to articulate uniform criteria for resolving the Question Presented. For example, in State v. Dedman, 102 P.3d 628, 636 (N.M. 2004), the New Mexico Supreme Court held that BAC results "prepared for trial" by a non-testifying "government officer" were not "testimonial" because they were "not

investigative or prosecutorial" but instead "routine, non-adversarial, and made to ensure an accurate measurement."

The California Supreme Court relied on similar factors in Geier, 161 P.3d at 139, when it held that DNA test results generated by non-testifying laboratory technicians were not "testimonial." A statement is "testimonial," the court explained, "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." Id. at 138. Because, in its view, the DNA test results "constitute[d] a contemporaneous recordation of observable events rather than the documentation of past events," the court held that the second prong of its test was not satisfied. Id. at 139.

The New Hampshire Supreme Court majority in this case found "the opinion * * * in Geier instructive," App., infra, 10a, but as discussed supra, pg. 10, engrafted onto the Geier standard two additional requirements for a statement relating to the collection or analysis of forensic evidence to be "testimonial," see App., infra, 12a. Specifically, a statement will be "testimonial" only if, in addition to satisfying the Geier factors, it is "prepared in a manner resembling ex parte examination" and

"accusatory." Id. at 12. Because, in its view, the Blood Collection Form and results of the Blood Analysis represented "contemporaneous recordation[s] of observable events" and were "neutral" (insofar as they "could have led to either incriminatory or exculpatory results"), the majority held that its test was not satisfied. Id. at 13a–14a.

Finally, in United States v. Washington, 498 F.3d 225, 228–31 (CA4 2007), a divided Fourth Circuit held that blood toxicology results generated by a chromatograph operated by non-testifying technicians did not implicate Crawford at all. In that case, the court reasoned that the toxicology results were not "statements" – much less, hearsay statements – under the Federal Rules of Evidence because they were generated not by "a person" but by the chromatograph. Id. at 229–30 (discussing Rule 801's repeated references to "a person"). Alternatively, the majority held that even if the results were hearsay statements, they were not "testimonial." Id. at 232. The majority so held because, in its view, the results (1) "relate[d] solely to the present condition of the blood, without making any links to the past," and (2) "did not look forward to 'later criminal prosecution,'" since "the machine could tell no difference between blood analyzed for

health-care purposes and blood analyzed for law enforcement purposes." Ibid. (emphasis in original).

3. This stark and widely acknowledged three-way split is entrenched and cannot be resolved absent intervention by this Court. Courts have had ample time to digest Crawford and have continued to reach conflicting decisions even after Davis. Most recent opinions merely acknowledge the split of authority and follow one of the preexisting formulations. See, e.g., App., infra, 9a-12a (surveying conflict in authority and choosing sides); Hinojos-Mendoza, 2007 WL 2581700 at *4 (same); March, 216 S.W.3d at 667 n.2 (same); Caulfield, 722 N.W.2d at 309-10 (same). This Court's intervention is sorely needed.

B. The Conflict Over the Question Presented Is Untenable

The profound conflict among state courts of last resort and the federal courts of appeals over the Question Presented is untenable for at least three reasons.

1. The scientific analysis of forensic evidence plays a central (and often pivotal) role in millions of criminal trials every year. See, e.g., Joseph L. Peterson & Matthew J. Hickman, Census of Publicly Funded Forensic Crime Laboratories, 2002, Department of Justice, Office of Justice Programs, Bureau of Just. Statistics Bulletin, Feb. 2005, at 5 <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpffcl02.

pdf> (reporting that "[p]ublicly funded crime laboratories in 2002 received 2,695,269 new cases"). Such analysis is used in prosecutions seeking to establish the presence or quantity of an illegal substance,[8] that a particular instrument was used to commit a certain crime, or that a particular individual committed a certain offense. See, e.g., Erin Murphy, The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence, 95 Cal. L. Rev. 721, 722 (2007) (observing that "traditional forensic evidence, such as handwriting, firearms, bullet, bite, toolmark and fingerprint identification, has long played a role in the criminal justice system").

Future prosecutions promise to rely even more on scientific analysis as technology continues to advance. See ibid. (observing that "a new generation of forensic sciences capable of uncovering and inculpating criminal offenders * * * such as DNA typing, data mining, location tracking, and biometric technologies * * * will surely stake a central and indispensable role in the future

[8] There are many such prosecutions. See Department of Justice, Federal Bureau of Investigation, Crime in the United States 2005: Uniform Crime Reports, <http://www.fbi.gov/ucr/05cius/data/table_29.html> (reporting 1,371,919 DUI arrests and 1,846,351 "drug-abuse violation[]" arrests nationwide in 2005).

administration of criminal justice"). Prosecutors' increasingly frequent reliance on DNA testing is simply a preview of what is likely to come. See, e.g., Peterson & Hickman, supra, at 10 (reporting the increased demand for DNA analysis "in recent years" because of "expanding casework").

2. The inability of criminal defendants to cross-examine individuals who collect, handle, and test relevant forensic evidence substantially undermines the integrity of the criminal justice system.

a. Put simply, the scientific analysis that is performed in prosecutorial crime laboratories is often inaccurate. See, e.g., Department of Justice, Project Advisory Committee, Laboratory Proficiency Testing Program, Supplementary Report—Samples 6-10, at 3 (1976) (reporting that thirty percent of state forensic examiners asked to test a substance for the presence of cocaine rendered incorrect results); Metzger, supra, at 491-500 (detailing numerous examples of erroneous convictions based on discredited forensics); Barry Scheck et al., Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted 246 (2000) (reporting that "tainted or fraudulent science" contributes to perhaps as much as

one third of wrongful convictions).[9] Even the FBI's most sophisticated laboratories have been plagued by startling error rates. 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) (describing a 1997 report by the Department of Justice Inspector General).

Human error in the collection, handling, and analysis of such evidence is one of the most common causes of erroneous laboratory results. See generally Edward Imwinkelried, The Debate in the DNA Cases Over the Foundation for the Admission of Scientific Testimony: The Importance of Human Error as a Cause of Forensic Misanalysis, 69 Wash. U. L.Q. 19 (1991). In fact, twelve percent of state prosecutors' offices have reported inconclusive DNA results because of the improper collection of evidence. See Steven W. Perry, Prosecutors in State Courts, 2005, Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, July 2006,

[9] A substantial number of such laboratories do not even follow any standardized procedures. See, e.g., Metzger, supra, at 494 (noting that "of the 400-500 laboratories conducting forensic examinations for criminal trials, only 283 are accredited"); Peterson & Hickman, supra, at 10 (reporting that only "[s]eventy-one percent of publicly funded laboratories in 2002 were accredited by some type of professional organization").

at 8 <http://www.ojp.usdoj.gov/bjs/pub/pdf/psc05.pdf>. Such human errors are likely to increase, as public facilities have begun to outsource their analyses, creating a potentially long and complicated chain of custody for some evidence. See Peterson & Hickman, supra, at 10 ("[T]o address the problem of rising caseloads * * * [f]orty-one percent of publicly funded laboratories * * * outsourc[ed] one or more types of forensic services in 2002").

b. In addition to engaging in careless or negligent practices, forensic examiners who work for state or federal law enforcement departments are prone to prosecutorial bias, which may in turn lead to poor judgment. See, e.g., Craig C. Cooley, The CSI Effect: Its Impact and Potential Concerns, 41 New Eng. L. Rev. 471, 490 (2007) (concluding that, "because most publicly funded crime labs are annexed with law enforcement or prosecutorial agencies," pressure by prosecutors or investigators may affect the tests that analysts conduct or the results they report); Edward J. Ungvarsky, Remarks on the Use and Misuse of Forensic Science to Lead to False Convictions, 41 New Eng. L. Rev. 609, 618 (2007) (reporting the "natural impulse" for a forensic technician, "when given both a complicated crime-scene profile and a suspect profile," to "combine her analysis of the samples and conclude that the suspect's

profile can be observed in the crime-scene evidence"). Such prosecutorial bias sometimes leads to outright misconduct. See Metzger, supra, at 495 & n.83 (discussing recent scandals in Baltimore, Phoenix, and Houston involving the falsification of evidence in those cities' crime laboratories); Michael J. Saks, Model Prevention and Remedy of Erroneous Convictions Act, 33 Ariz. St. L.J. 665, 674 (2001) (noting that thirty-one percent of overturned convictions have resulted in part from deception, sometimes on the part of the technicians running the forensic tests).

3. The vast majority of jurisdictions (including New Hampshire) have statutes that allow prosecutors to introduce the results of scientific analysis of forensic evidence without the testimony of those individuals who collected, handled, or tested the forensic evidence. See Metzger, supra, at 478 & n.9 (collecting statutes from forty-five jurisdictions).[10] "When properly invoked, these statutes enable the prosecution to prove, through * * * hearsay * * * both the chain of custody and the 'truth' of the forensic tester's conclusions." Id. at 479. Even in

[10] Numerous states also allow the admission of forensic certificates as hearsay evidence to proffer "the results of DNA tests, microscopic hair analyses, fingerprint identifications, coroners' reports, ballistics tests, and a wide range of other tests conducted by a crime laboratory." Metzger, supra, at 479; see also id. at 479 n.12 (collecting citations).

the absence of such a statute, nearly every jurisdiction allows expert witnesses to testify on direct examination to the content of hearsay matters – such as the results of forensic analysis – on which the experts' opinions are at least partially based. See Fed. R. Evid. 703 (providing that "otherwise inadmissible" "facts or data" on which an expert relies may "be disclosed" to the fact-finder if "their probative value * * * substantially outweighs their prejudicial effect"); Admissibility of Testimony of Expert, as to Basis of His Opinion, to Matters Otherwise Excludible as Hearsay – State Cases, 89 A.L.R.4th 456 § 3 (1991 & 2007 Supp.) (collecting cases); see also, e.g., Giannelli, Expert Testimony, supra, at 54-62.

In every such case, the ability of the accused to cross-examine the individuals who collected, handled, and tested the relevant forensic evidence turns entirely on the resolution of the Question Presented. This case directly presents two extremely common examples of the introduction of the scientific analysis of forensic evidence without the testimony of those individuals who collected, handled, or tested the evidence.

a. To show that a sample of petitioner's blood "was taken * * * according to the procedures prescribed in the rules adopted by the * * * department of safety," the State

sought the admission of the Blood Collection Form (App., infra, 24a) completed and signed by the medical technician who drew petitioner's blood. N.H. Rev. Stat. § 265-A:12(IV) (formerly § 265:90(IV)).

Instead of having the medical technician testify at petitioner's trial, the State moved for the form's admission during the testimony of the arresting police officer. Tr. 44-45. The state did so under a New Hampshire statute which provides that

> [a] copy of the appropriate form filled out and signed by the person who took the sample for the alcohol concentration test * * * shall be admissible evidence that the sample was taken by such person at the stated time on the stated date according to the procedures prescribed in the rules adopted by * * * the department of safety.

N.H. Rev. Stat. § 265-A:12(IV) (formerly § 265:90(IV)) (emphasis added); see also Coombs, 821 A.2d at 1031 (noting that the then-§ 265:90 "creates an exception to the rule against hearsay").

This exception to the rule against hearsay denied petitioner the opportunity to cross-examine the individual who drew his blood about, inter alia, whether his blood sample was - as the Blood Collection Form asserted -

collected "in accordance" with the Department of Safety's applicable rules, App., infra, 24.[11]

b. To show that petitioner's BAC was above the legal limit, the State sought to elicit the results of its forensic laboratory's Blood Analysis. In lieu of presenting live testimony by the laboratory technician who actually tested petitioner's blood, the State presented the results of petitioner's BAC test through the testimony of Dr. Wagner, who certified – but did not perform – the Blood

[11] Of course, cross-examination could have addressed the truthfulness of the technician's assertion on the Blood Collection Form that "[t]he area from which [petitioner's] blood was taken was cleansed with a non-alcoholic cleanser" and that the sample was otherwise collected "in accordance" with the Department of Safety's applicable rules. App., infra, 24a.

Perhaps more importantly, however, cross-examination could have addressed whether the collection procedure employed by the medical technician satisfied the precise requirements of the New Hampshire Department of Safety. At all times relevant here, the Department of Safety required: (1) that a non-alcoholic cleanser be used to clean the area of skin from which blood will be drawn; (2) that needles and syringes used to draw blood "be pre-sterilized and shall not be cleansed;" (3) that the container used to collect a blood sample contain specified amounts of sodium fluoride and potassium oxalate to preserve the sample and prevent coagulation; and (4) that once filled, the container "be inverted several times to mix the preservative and anticoagulant." N.H. Code Admin. R. He-P §§ 2202.03(b)-(d), 2202.05(a)(2) (expired 2005; reauthorized in part and renumbered at N.H. Code Admin. R. Saf-C §§ 6402.02(b), 6402.03(a)(2)). [The expired regulations are reproduced at App., infra, 26a-35a.] Only cross-examination of the medical technician who actually drew petitioner's blood would allow petitioner to verify compliance with these comprehensive requirements.

Analysis. Because the trial court allowed Dr. Wagner to testify as an expert, see Tr. 65, and because settled New Hampshire precedent (like that of many other jurisdictions) allows "an expert [to] give an opinion * * * based in part on hearsay," e.g., In re Mundy, 85 A.2d 371, 373 (N.H. 1952) (citations omitted), Dr. Wagner was allowed to testify as to the results of the Blood Analysis, see Tr. 76.

Consequently, petitioner was denied the opportunity to cross-examine the individual who analyzed his blood about, inter alia, whether the testing of his blood was "performed in accordance with the methods prescribed by the * * * department of safety." N.H. Rev. Stat. § 265-A:5(IV) (formerly § 265:85(IV)).[12] As the trial transcript makes plain, Dr. Wagner (because he was not the actual analyst of petitioner's blood) was unable to establish compliance with all of those procedures in this case. See Tr. 79-82 (acknowledging no knowledge of whether petitioner's blood

[12] Those requirements are comprehensive. For example, in addition to some of the requirements detailed supra note 11, the Department of Safety also required: (1) that any blood sample "be placed in a secure refrigerator * * * no greater than 46°F or 8°C" "until the time of analysis" and (2) that any blood sample "[b]e allowed to equilibriate to room temperature prior to analysis." N.H. Code Admin. R. He-P §§ 2202.09(e), 2202.10(e)(2)(c) (expired 2005; reauthorized in part and renumbered at N.H. Code Admin. R. Saf-C § 6402.08(c)).

sample contained required anticoagulant and preservative), 83–85 (acknowledging no knowledge of laboratory refrigerator temperature on relevant date), 86–87 (acknowledging no knowledge of whether laboratory analyst caused petitioner's blood sample to equilibrate before testing).

C. This Case Is an Ideal Vehicle for Resolving the Question Presented.

For two significant reasons, this case provides an ideal vehicle for this Court to resolve the Question Presented.

1. Unlike many other Confrontation Clause cases, the Question Presented was unquestionably outcome determinative in this case.

a. The New Hampshire Supreme Court made clear that no state-law issue was presented. Although petitioner argued below that his rights under the state constitution were also violated, the New Hampshire Supreme Court expressly held that petitioner "failed to demonstrate that he raised a state constitutional issue in the trial court" and, therefore, "decline[d] to consider his State Confrontation Clause argument and limit[ed] [its] review to his claims under the Federal Confrontation Clause." App., infra, 5a.

b. Before proceeding to the Question Presented, the New Hampshire Supreme Court rejected the State's argument that "any error in admitting the blood sample collection form and [Dr. Wagner's] testimony about the blood test results constituted harmless error." App., infra, 4a. According to the court, "[t]he alternative evidence of the defendant's guilt was not so overwhelming that the blood sample collection form and blood test results were merely cumulative or inconsequential." Id. at 5a.[13]

2. This case provides the Court a desirably unique opportunity to resolve the Question Presented as it applies to both the collection and testing of forensic evidence.

As explained throughout this petition, an overwhelming number of criminal cases in the 21st century involve forensic proof. In all such cases, the evidentiary soundness of the forensic proof necessarily depends on the prosecution establishing two things: that the subject evidence was collected properly and that it was tested

[13] It appears that the defendant in Geier, supra, may soon petition this Court for certiorari. See Geier v. California, No. 07A-230 (pet. for cert. due Nov. 15, 2007). Unlike this case, the California Supreme Court held in Geier, 161 P.3d at 140-41, that any violation of the defendant's Confrontation Clause rights was harmless beyond a reasonable doubt. Accordingly, this Court's resolution of any Confrontation Clause challenge in Geier would not be outcome determinative. This case is, therefore, a superior vehicle for resolving the Question Presented.

properly. This case involves separate hearsay statements about both the collection and testing of forensic evidence. As such, it provides this Court with an opportunity to address conclusively the scope of the Confrontation Clause where forensic evidence is concerned.

Many cases address the Question Presented, but only with regard to hearsay statements about the collection or chain of custody of forensic evidence. See, e.g., Walsh, 124 P.3d at 207–08. Many other cases address the Question Presented, but only with regard to hearsay statements about the testing of forensic evidence. See, e.g., Hinojos-Mendoza, 2007 WL 2581700 at *4–*5; Verde, 827 N.E.2d at 705–06.[14] Those cases that address the Question Presented with regard to hearsay statements about both the collection and testing of forensic evidence often do not involve separate statements. See, e.g., Ellis, 460 F.3d at 926–27 (involving a single document that contained information regarding collection and testing); Thomas, 914 A.2d at 11–20 (same).

The attractiveness of addressing the meaning of "testimonial" with respect to the separate statements in

[14] A petition for a writ of certiorari was recently filed in one such case. See Commonwealth v. Melendez-Diaz, No. 05-P-1213, 2007 WL 2189152 (Mass. App. July 31, 2007), pet. for cert. filed Oct. 26, 2007 (No. 07-591).

this case is illustrated by Davis, supra. Davis involved two consolidated cases, each asking whether certain excited utterances to law enforcement were testimonial. One case involved a victim's hearsay statement to a 911 operator while in the midst of a domestic disturbance. See Davis, 126 S. Ct. at 2270-71. The other involved a victim's in person statement to a police officer shortly after a domestic disturbance had ended. See id. at 2272.

The Court's ability to consider the two cases' subtle differences no doubt facilitated the Court's articulation of its clear and comprehensive answer to the question presented:

> 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.

Id. at 2273-74. The separate statements at issue in this case – unlike the singular statements in most other cases seeking resolution of the Question Presented – will similarly facilitate the Court's ability to articulate a clear and comprehensive answer to the Question Presented here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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