No. 07-7577

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND RULES:

MISCELLANEOUS:

BRIEFS:

REPLY BRIEF FOR THE PETITIONER

This case provides an ideal opportunity to resolve a frequently recurring and extremely important constitutional question that has deeply divided the lower courts: 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). As the State of Missouri recently noted,

> the conflict will only deepen as more state courts of last resort and federal courts of appeal address this issue. And they will address it; laboratory tests are useful and even necessary not just in drug cases, but in a wide range of prosecutions. Only this Court can eliminate that division and provide clear guidance.

Cert. Pet. at 10, Missouri v. March, 216 S.W.3d 663 (Mo. 2007) pet. for cert. dismissed Oct. 5, 2007 (No. 06-1699) (emphasis added).[1]

Respondent fails to provide any convincing reason for this Court to delay further the resolution of this widely acknowledged conflict. Indeed, respondent does not dispute

[1] While the petition filed by the State of Missouri in March 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.

(1) that there is a deep three-way split over the frequently recurring and exceptionally important Question Presented, or

(2) that this case presents an ideal vehicle for its resolution.

Having thereby conceded the essential elements of this Court's certiorari inquiry, respondent is reduced to arguing that this Court should nonetheless deny the petition because the conflict over the Question Presented is not "sufficiently developed" to warrant immediate intervention by this Court. BIO 4. As explained *infra* (at 7-10), this contention is unfounded.[2]

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[2] Much of respondent's opposition is spent addressing the merits of the Question Presented. See, e.g., BIO 14-18 (arguing that the decision below is on the correct side of the lower court split). Of course, petitioner disagrees with respondent and will respond in detail if this Court grants review. Curiously, however, respondent asserts that the validity of the New Hampshire Supreme Court's position on the merits of the Question Presented - the very issue about which the lower courts sharply disagree - is itself a reason for this Court to deny the petition. BIO 4, 14-18. Respondent is mistaken.

When a conflict develops in the lower courts regarding an important question of constitutional law, the conflict is the reason for certiorari. Which side of the split is adopted by the lower court in a particular case is not part of the calculus regarding whether further review is warranted. See Supreme Court Rule 10(b) (noting that "compelling reasons" for certiorari include whether "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals"). As explained herein, this case involves such a conflict between thirteen such courts.

A. Respondent Does Not Dispute That There Is A Deep Three-Way Split Over the Question Presented or That It Is Recurring and Exceptionally Important

There is a profound three-way split over the Question Presented which was explicitly recognized by both the majority and dissenting justices of the New Hampshire Supreme Court below. See Pet. App. 9a-12a (Maj. Op.); 19a-22a (Duggan, J., dissenting). As explained in the petition, this conflict involves thirteen state courts of last resort and federal courts of appeals. Pet 12-17.

The substance of the split is stark. When asked to decide whether hearsay statements regarding the collection or testing of forensic evidence made in anticipation of prosecution are "testimonial," one group of courts has said "categorically yes";[3] one group has said "categorically

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[3] These courts have adopted what the New Hampshire Supreme Court referred to as a "bright line test," Pet. App. 9a, which turns on whether such statements were created for later use in prosecution. See Hinojos-Mendoza v. People, 169 P.3d 662, 666-67 (Colo. 2007) (holding that laboratory report was "testimonial" because it "was prepared at the direction of the police" and made "in anticipation of criminal prosecution"); Roberts v. United States, 916 A.2d 922, 938-39 (D.C. 2007) (recognizing that expert opinion based on testimonial conclusions prepared by non-testifying scientists in anticipation of prosecution violated appellant's right to cross-examination); State v. March, 216 S.W.3d 663, 665-67 (Mo. 2007) (noting that when a laboratory report is created for the purpose of prosecuting a criminal defendant, it is testimonial); State v. Caulfield, 722 N.W.2d 304, 308-10 (Minn. 2006) (noting that the "critical determinative factor in assessing whether a statement is testimonial is whether it was

no";[4] and a third group has said "it depends on several factors."[5] Respondent cannot, and does not, dispute the existence of this profound and stark conflict.

Similarly, respondent does not dispute that the Question Presented is frequently recurring and exceptionally important. Nor could it. Modern criminal prosecutions rely heavily and regularly on the use of forensic evidence. And such evidence is often outcome

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prepared for litigation"); Las Vegas v. Walsh, 124 P.3d 203, 207-08 (Nev. 2005) (en banc) (recognizing that affidavit describing nurse's blood extraction process was "testimonial" because it was made to be used at a later trial or legal proceeding), cert. denied, 547 U.S. 1071 (2006) (No. 05-1052).

[4] These courts have developed what the New Hampshire Supreme Court referred to as "a different bright line test based upon dicta in Crawford regarding business records." Pet. App. 9a. See United States v. Ellis, 460 F.3d 920, 926-27 (CA7 2006) (finding that report containing chain-of-custody information and results of police-directed blood test constituted a business record); Commonwealth v. Carter, 932 A.2d 1261, 1268 (Pa. 2007) (admitting a laboratory report under the business records exception does not violate the confrontation clause); State v. Forte, 629 S.E.2d 137, 142-44 (N.C. 2006) (holding that DNA report was a business record and, consequently, did not violate the confrontation clause), cert. denied, 127 S. Ct. 557 (2006) (No. 06-6282); Commonwealth v. Verde, 827 N.E.2d 701, 705-06 (Mass. 2005) (finding certificate of analysis admissible under business records exception because it is not testimonial).

[5] The courts in this group - which include the New Hampshire Supreme Court below - have refused to apply a categorical approach to resolve the Question Presented. See State v. Dedman, 102 P.3d 628, 636 (N.M. 2004); People v. Geier 161 P.3d 104,139 (Cal. 2007); United States v. Washington, 498 F.3d 225, 228-31 (CA4 2007).

determinative. Pet. 17-22. The frequency and importance of the Question Presented is widely acknowledged,[6] and has led one of the leading authorities on the Confrontation Clause to recently declare that "[t]he Supreme Court will have to resolve this matter, and in my view the sooner the better."[7]

B. Respondent Does Not Dispute That This Case Is An Ideal Vehicle For Resolution Of The Question Presented

Although the Question Presented is frequently recurring, most petitions filed in this Court that present the question are opposed on vehicular grounds. See, e.g., BIO at 13, Geier v. California, 161 P.3d 104 (Cal. 2007) pet. for cert. filed Nov. 14, 2007 (No. 07-7770) (noting that "any alleged error must be deemed harmless beyond a reasonable doubt" and citing the California Supreme Court which expressly held that "[e]ven if Dr. Cotton's reliance

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[6] See generally Thomas F. Burke III, The Test Results Said What? The Post Crawford Admissibility of Hearsay Forensic Evidence, S.D. L. Rev. __ (forthcoming 2008) <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=thomas_burke>; John M. Spires, Testimonial or Non-Testimonial? The Admissibility of Forensic Evidence After Crawford v. Washington, 94 Ky. L.J. 187, 194 - 96 (2005); Bradley Morin, Note, Science, Crawford, and Testimonial Hearsay: Applying the Confrontation Clause to Laboratory Reports, 85 B.U. L. Rev. 1243 (2005).

[7] Confrontation Blog, Deepening Conflict on Lab Reports, <http://confrontationright.blogspot.com/2007/03/deepening-conflict-on-lab-reports.html#comments> (March 21, 2007 posting by Richard D. Friedman, Ralph W. Aigler Professor of Law at the University of Michigan Law School).

on Yates's report violated defendant's Sixth Amendment rights as construed by Crawford, any error was harmless."); BIO at 3, 5, Jessamy v. Commonwealth, 127 S. Ct. 2436, pet. for cert. denied May 21, 2007 (No. 06-10178) (arguing that "Petitioner procedurally defaulted his Confrontation Clause claim in State court by failing to object to admission of the certificates of analysis" and that "[a]ny error was harmless beyond a reasonable doubt."); BIO at 12, Craig v. Ohio, 127 S. Ct. 1374, pet. for cert. denied Feb. 26, 2007 (No. 06-8490)(arguing that "any error was harmless beyond a reasonable doubt"); BIO at 9, Campbell v. North Dakota, 127 S. Ct. 1150, pet. for cert. denied Jan. 22, 2007 (No. 06-564) (arguing that "[e]ven if the admission of the laboratory report in this case were deemed improper, there was ample additional evidence for the jury to find the petitioners guilty."); BIO at 4, Gehner v. Las Vegas, 547 U.S. 1071 (2006) (No. 05-1052) ("Gehner has yet to go to trial or be convicted pursuant to his pending criminal charge of driving under influence. His petition for writ of certiorari is essentially a request for interlocutory relief."). In this case, however, respondent does not - and cannot - make any such vehicular argument.[8] As

[8] For example, respondent expressly concedes: "The state court [] ruled that '[g]iven th[e] record, [it could] not

explained in the petition, this case provides a unique and ideal opportunity to resolve the Question Presented. Pet. 27-30.

C. Immediate Resolution By This Court Is Needed

Unable to dispute the existence, depth, or significance of the lower court conflict over the Question Presented, respondent argues that the conflict is not "sufficiently developed" to warrant intervention by this Court. BIO 4, 10. Specifically, respondent argues that this Court should decline to review the Question Presented until the lower courts have had an opportunity to revisit it in the wake of Davis v. Washington, 126 S. Ct. 2266 (2006). See BIO 4-13. Respondent's argument is without merit. Put simply, there is absolutely no reason to believe that this Court's Davis decision will have any effect on the profound split in the lower courts.

Respondent's rank speculation is belied by the judicial record. Of the thirteen decisions that are split three ways on the Question Presented, nine were issued subsequent to Davis. These nine post-Davis decisions are themselves split three ways. And there is no reason to

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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.'" BIO 3 (citing O'Maley, 932 A.2d at 6).

believe that any of the four other courts will reconsider the Question Presented; despite having ample post-Davis opportunities to do so, none has revisited the issue. In fact, two - the Massachusetts Supreme Judicial Court and the North Carolina Supreme Court - have affirmatively declined the invitation by denying discretionary review of post-Davis cases posing the Question Presented.[9]

Respondent cannot point to a single court that has reversed its position on the Question Presented in light of Davis. This is not surprising because Davis examined Crawford's applicability to excited utterances in the context of police questioning. It did not resolve or address whether hearsay statements regarding the collection or testing of forensic evidence are testimonial in nature. In fact, the Davis Court explicitly declined to "produce an

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[9] See, e.g., State v. Heinricy, 645 S.E.2d 147, 150 (N.C. Ct. App.) (holding that a chemist's affidavit containing defendant's blood alcohol level was nontestimonial), rev. denied, No. 325P07, --- S.E.2d ---, 2007 WL 4711402 (Dec. 6, 2007); Commonwealth v. Melendez-Diaz, 69 Mass. App. Ct. 1114, 870 N.E.2d 676 (Table) (stating that certificates of drug analysis are nontestimonial), rev. denied, 449 Mass. 1113, 874 N.E.2d 407 (Table) (2007), pet. for cert. filed Oct 26, 2007 (No. 07-591); Commonwealth v. Jackson, 68 Mass. App. Ct. 1115, 863 N.E.2d 583 (Table) (stating that certificates of drug analysis are nontesimonial), rev. denied, 449 Mass. 1104, 868 N.E.2d 132 (Table) (2007); Commonwealth v. Franco, 66 Mass. App. Ct. 1106, 846 N.E.2d 792 (Table) (holding that certificates of drug analysis were nontestimonial), rev. denied, 447 Mass. 1105, 850 N.E.2d (2006).

exhaustive classification of all conceivable statements * * * as either testimonial or non-testimonial." Davis, 126 S. Ct. at 2273.

As one commentator recently explained:

> Though [Davis] no doubt provide[s] a clearer concept of what "testimonial" was meant to encompass, the Court refrained from answering whether it is sufficient that the declarant knows or intends that the statement will be used in a prosecution; that the government actor knows or intends that the received statement will be used in a prosecution; or whether both of these conditions might be necessary for a statement to be testimonial. Also importantly, the Davis Court failed to address the interplay (suggested in Crawford) between the Confrontation Clause and the business and public records exceptions. These questions [] have frustrated lower courts wrestling with the definition of "testimonial" in the hearsay forensic records context.

Burke, supra, at 10. (emphasis added). Whatever "aspects" of Crawford respondent believes that Davis "clarified," BIO 9, the Question Presented was not one of them.[10]

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[10] Indeed, those decisions that have explicitly considered Davis have also split three ways. Six have incorporated Davis in their analysis, and they are split 2-1-3: two courts answered the Question Presented with a categorical "yes;" one court with a categorical "no;" and three courts, including the New Hampshire Supreme Court below, have said "it depends on several factors." See March, 216 S.W.3d at 663; Roberts, 916 A.2d at 922; Ellis, 460 F.3d at 926-927; Geier, 161 P.3d at 139; Washington, 498 F.3d at 225; Pet. App. 9a-12a.

Respondent half-heartedly attempts to minimize the magnitude of the current split of authority by contending that "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." BIO 13. Respondent's criticism is unpersuasive.

Because Davis has not and will not resolve the split below, denying certiorari will leave the lower courts divided and the proper contours of a constitutional guarantee undrawn. Delaying resolution of the Question Presented would simply perpetuate inconsistent treatment of defendants across jurisdictions on a matter for which the Constitution intended uniformity. Neither States nor defendants benefit from such uncertainty. The application of critical federal constitutional rights should not be so arbitrary, nor should such a situation be allowed to persist.

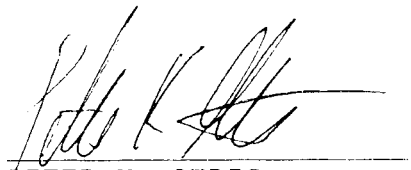
Minor factual differences regarding how evidence was presented do not change the fact that in each case (1) a hearsay statement regarding the collection or testing of forensic evidence was offered as evidence and (2) the deciding courts embraced different answers to the Question Presented.

It is also puzzling that respondent challenges the relevance of cases specifically dealing with the collection and testing of scientific forensic evidence while simultaneously suggesting that Davis - a case having nothing to do with the collection and testing of scientific forensic evidence - will somehow create uniformity in the manner in which courts resolve the Question Presented.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.



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OCTOBER TERM 2007

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v.

THE STATE OF NEW HAMPSHIRE

CERTIFICATE OF SERVICE

I, Peter K. Stris, a member of the Bar of this Court, hereby certify that on January 31, 2008, as required by Supreme Court Rule 29, the enclosed REPLY BRIEF OF THE PETITIONER was served by email and first-class mail, postage prepaid, on counsel for the Respondent:

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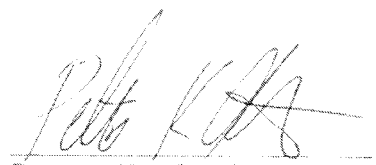
I further certify that all parties required to be served have been served.



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