No. 06-564

IN THE

Supreme Court of the United States

Thomas D. Pinks and Billie Jo Campbell,
Petitioners,

v.

North Dakota,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of North Dakota

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the North Dakota Supreme Court correctly found that petitioners waived their Confrontation Clause claim by failing to avail themselves of a state law allowing them to subpoena the witness to testify at trial, and whether the overwhelming evidence of the petitioners' guilt would make any error harmless.

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RESPONDENT'S BRIEF IN OPPOSITION

Petitioners ask the Court to resolve an issue that the North Dakota Supreme Court specifically refused to reach - whether certified laboratory reports are "testimonial" within the meaning of *Crawford* v. *Washington*, 541 U.S. 36 (2004). It is settled Supreme Court practice, however, "not to decide in the first instance issues not decided below," *National Collegiate Athletic Assn.* v. *Smith*, 525 U.S. 459, 470 (1999); accordingly this case is not a proper vehicle for answering the question presented.

What the North Dakota Supreme Court did decide is that, "*even assuming* the report is testimonial" under *Crawford*, petitioners' Confrontation Clause rights were not offended because the petitioners had a statutory right to summon the report's author to trial and declined to do so. Pet. App. at 8a. (*Emphasis added*) Petitioners attempt to turn this impediment to Supreme Court review into an added reason to grant their petition - claiming that the state court's decision implicates a split over whether parties who decline to exercise their legal right to summon laboratory report writers can still claim error under the Confrontation Clause. Pet. at 8-18. The split petitioners allege is illusory, however, and the question presented in this case is therefore inappropriate for certiorari review.

STATEMENT OF THE CASE

This case involves a ruckus at the Lewis & Clark Saloon in Washburn, North Dakota during mid-January, 2005. The saloon owner called the police as the petitioners left the scene. A deputy sheriff responded and witnessed the petitioners'

vehicle traveling in the area. The deputy followed the vehicle as it made a quick turn onto a side street, a second quick turn into an alley, and then stopped with the deputy stopping behind it.

The windows on the petitioners' vehicle were frosted over to the point that the deputy could not see inside. Upon exiting his patrol car and approaching the petitioners' vehicle, the deputy found Mr. Thomas Pinks in the front passenger seat and Ms. Billie Jo Campbell in the back seat. No one was in the driver's seat. The deputy asked Mr. Pinks who was driving the vehicle and he claimed the driver had fled. The deputy explained that he had been behind the vehicle and did not witness anyone get out and that there were no foot prints in the snow where Mr. Pinks claimed the driver had run. Mr. Pinks reiterated his claim and stated that he had to hit the brakes and put the vehicle in park when the driver jumped out.

The petitioners were separated. Mr. Pinks was placed in a backup officer's patrol car and Ms. Campbell was placed in the responding deputy's patrol car. The officers determined that both petitioners were under the influence of alcohol. During the investigation the officers found a metal "one-hitter" marijuana smoking device between the vehicles where Mr. Pinks had walked. This device was warm to the touch and free of frost despite laying on the ice and snow with an outside air temperature of ten to twenty degrees below zero. Mr. Pinks was arrested for being in Actual Physical Control of a Motor Vehicle while under the Influence of Alcohol (APC) , a Class B Misdemeanor, and Possession of Drug Paraphernalia, a Class A Misdemeanor. (Mr. Pinks was also charged with Criminal Mischief for breaking a bar glass and stool in the saloon but was acquitted on that charge.)

Ms. Campbell was taken into custody and transported to the sheriff's department to be detoxicated. When she exited

the patrol car, the deputy found a baggie of marijuana in the back seat. In addition, a search of her coat by a jailer yielded marijuana seeds and stems. Ms. Campbell was charged with Possession of Marijuana, a Class B Misdemeanor, and Possession of Drug Paraphernalia, a Class A Misdemeanor.

During the trial the contraband found in the petitioners' possession was admitted into evidence. In addition, the jury heard testimony from the arresting officer that he is trained in identifying marijuana and drug paraphernalia, and he was able to identify the items seized as contraband. In particular, he had sniffed the "one-hitter" after observing residue on it and could smell the odor of burnt marijuana.

The jury also received a copy of a certified laboratory report which reported the items found were marijuana and "Resin of Cannabis" on the smoking device. Both petitioners objected to the admission of the laboratory report on the grounds that without the testimony of the report writer it was barred by *Crawford*. The trial court heard arguments in chambers regarding the petitioners' objection and overruled them. The laboratory report was admitted into evidence. (There was no laboratory report regarding Mr. Pinks' blood alcohol level relating to his APC charge because he refused to take a chemical test.)

The jury returned guilty verdicts on the drug and APC charges. Both petitioners appealed their convictions to the North Dakota Supreme Court claiming the trial court had committed error in admitting the laboratory report without the testimony of the report writer. Bypassing the issue of whether the laboratory report was testimonial or admissible as a business or public record, the court ruled that the petitioners waived their right to complain about a Confrontation Clause violation because North Dakota law permitted them to subpoena the report writer.

REASONS FOR DENYING THE PETITION

I. Petitioners ask this Court to decide an issue that the North Dakota Supreme Court expressly declined to decide.

Petitioners assert that the Court should use this case to flesh out the meaning of "testimonial" under *Crawford*. They allege a deep split in authority "over the question of whether state crime laboratory reports are testimonial." Pet. at 14. They go on to claim the reports are "quintessentially testimonial" and that "[t]he unchecked use of state crime laboratory reports in place of live testimony undermines the integrity of the criminal justice system." *Id.* at 22, 26. While the respondent strongly disagrees with these claims, they are ultimately irrelevant to this petition.

The North Dakota Supreme Court specifically refused to decide whether the laboratory report at issue was testimonial: "Since the resolution of this case makes it unnecessary to decide whether the report is a testimonial statement, we determine the prudent course is not to decide an unnecessary question." Pet. App. at 2a, 8a.

This Court has announced repeatedly its refusal "to not decide in the first instance issues not decided below." *National Collegiate Athletic Assn.* v. *Smith*, 525 U.S. 459, 470 (1999); *see also Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (*per curiam*)

In this case, not only did the state court not decide the question but its decision includes dicta actually favoring the petitioners' position. *See* Pet. App. at 5a. (observing that "the forensic scientist's report bears testimony in the sense that it is a 'solemn declaration or affirmation made for the purpose of

establishing or proving some fact.'") (quoting *Crawford*, 541 U.S. at 51) Indeed, petitioners have no reason to think that the very claim they would advance in this Court - that laboratory reports are "testimonial" within the meaning of *Crawford* - will not prevail in the North Dakota courts. In short, this case is not the appropriate vehicle for addressing the question the petitioners presented or for resolving the alleged split in authority to which the petitioners devote so much of their petition.

It is important to note that the context in which the Court reviewed the application of the Confrontation Clause in *Crawford* dealt with the admissibility of a prior statement from a lay witness to a crime. While not inclusively defining testimonial statements, the Court stated that the term at least included prior statements made at preliminary hearing, before grand juries, at a former trial, and during police interrogations. *Crawford* at 68.

When admittance of a certified laboratory report is the subject of Confrontation Clause analysis, some questions are distinct from lay witnesses to a crime who are clearly "witnesses against him." *See White* v. *Illinois*, 502 U.S. 346, 359 (1992)(THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment.)

If the author of a laboratory report, a nurse who drew blood from a DUI suspect, a person who does maintenance on a breath testing device, and many other examples are 'witnesses against him' under the Confrontation Clause, only then does the analysis shift to whether the laboratory report, or foundational document for that report, is testimonial under *Crawford* or admissible as a business or public record. ("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...." *Crawford* at 68.)

The North Dakota Supreme Court did not rule on any of these issues. Recently, the Court revisited *Crawford* and refined the term 'testimonial' based on new facts and circumstances. *See Davis* v. *Washington*, 126 S.Ct. 2266, 2273 (2006). If the Court revisits *Crawford* in this case, it would do so without the benefit of a lower court's factual analysis and legal findings.

II. This case does not implicate a split over whether parties with the power to compel the appearance of the author of a laboratory report can still claim error under the Confrontation Clause.

Petitioners contend that the actual basis for the state court's decision - the fact that petitioners declined to subpoena and confront the author of the laboratory report at trial as it was their right to do under state law - is itself reason to grant review in this case. Petitioners allege a deep split among "[s]tate courts of last resort and federal courts of appeals" on this question. Pet. at 9. However, most of the petitioners' authority predates *Crawford* which the Court decided in 2004, and is therefore inapposite[1].

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[1]Respondent does not concede that there is a substantial division between lower court pre-*Crawford* authorities and the North Dakota Supreme Court on this issue. Many of the petitions' pre- *Crawford* authorities address a range of issues either unrelated to or distinct from the question presented. For example, in *State v. Coombs*, 821 A.2d 1030 (N.H. 2003), Pet. at 12, the court addressed a statute that

Crawford changed the analytical framework for resolving Confrontation Clause claims. Whether a defendant's statutory right to "subpoena the director or an employee of the state crime laboratory to testify at a preliminary hearing or trial" without cost to the defendant under N.D. Cent. Code §19-03.1-37(5) defeats a Confrontation Clause challenge needs to be decided in light of *Crawford*. Accordingly, any pre-*Crawford* dispute over this question is now moot. Petitioners implicitly acknowledge as much when they use *Crawford* to argue that North Dakota's subpoena right is constitutionally insufficient. *See* Pet. at 21.

Petitioners two post-*Crawford* decisions from "[s]tate courts of last resort and federal courts of appeals" do not show any split in authority. Applying *Crawford*, the D.C. Circuit found no Confrontation Clause violation where defendants failed to take advantage of a law allowing them to subpoena the chemist who authorized the report. *See Howard* v. *United States*, 902 A.2d 127,135 (D.C. 2006); Pet. at 9.

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allowed a certifying scientist to testify in a blood test case in lieu of the report writer. The court held that the admission of the blood test report did not violate the defendant's rights under the Confrontation Clause." *Id.* at 1033. Petitioners cite dicta from *Coombs* for the proposition that "the defendant's ability to subpoena a forensic examiner "is beside the point" because "[t]he duty to confront a defendant with witnesses falls upon the State." *Id.* However, the context of that dicta related to another statute (not at issue in *Coombs*) that placed a burden on the defendant to file "specific grounds" for an objection to the laboratory report within ten days of trial. *Id.* at 1032. *Coombs* actually supports the North Dakota Supreme Court's decision in the present case.

The petitioners' other post-*Crawford* (state court of last resort) authority, *State* v. *Snowden*, 986 A.2d 314 (Md. 2005); *see* Pet. at 13, did not involve laboratory reports and is not in conflict with the present case. *Snowden* involved a state law allowing a sexual abuse investigator to testify to statements made to her by a child. *Id.* at 319. In relevant part, the narrow question before the Maryland court was whether the defendant waived his Sixth Amendment claim by failing to lodge a specific objection to the prosecution's failure to call the child to testify. *Id.* at 330-33. The court ruled the defendant had sufficiently objected and preserved the issue for appeal, but did not address a state law right like North Dakota's statutory right to call the author of a laboratory report writer free of costs.

In *Belvin* v. *State*, 922 So.2d 1046 (Fla.App. 4 Dist. 2006) an intermediate appellate court reviewed an affidavit from a breath test operator that was admitted at trial as a substitute for the testimony of the test operator. North Dakota has no similar statute. In addition, this case is currently under review with the Florida Supreme Court. *See State* v. *Belvin*, 928 So. 2d 336 (Fla. 2006)

The differences, in reality, between lower courts over this issue are much shallower than the petition alleges. For example, petitioners rely upon *Schaal* v. *Gammon*, 233 F.3d 1103 (CA8 2000) to allege a division on this issue between North Dakota and the Eighth Circuit Court of Appeals. Pet. at 14.

Schaal is a pre-*Crawford* child sex case. The issue under review in *Schaal* was whether the prosecution was required to call the child as a witness, or whether a taped interview of the child alone could be played for the jury. The court ruled that

the child must testify to satisfy the Confrontation Clause. *Id.* at 1106-07. In a case released just weeks prior to and cited in the present case, the North Dakota Supreme Court ruled on an identical issue in an identical way. *See State* v. *Blue*, 2006 ND 134, 717 N.W.2d 558. The Confrontation Clause issues in child sex cases are distinct from the present case.

When an "apples to apples" analysis of the cases is made, the petition fails to establish a claim that there is a percolated lower court dispute regarding a defendant's ability to subpoena a report writer in the post-*Crawford* era. Frankly, *Crawford* and *Davis* are too recent for it to be otherwise.

III. Even 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.

This case was not about a laboratory report during the trial. Neither petitioner made an argument to the jury that the exhibits were not marijuana or drug paraphernalia. The arresting officer was able to identify the exhibits as contraband through his training and he testified that the "one-hitter" had residue that smelled of burnt marijuana. Tr. p. 75, lines 23-25; p. 76, lines 1-8; p. 102, lines 20-25.

Petitioners used their closing argument attempting to persuade the jury that the prosecutor's burden of proof was just so incredibly high that "we cannot brand" the petitioners as criminals based on the evidence before them. Tr. 167, lines 1-5. In addition to other arguments, petitioners argued the prosecutor should have presented DNA or fingerprint evidence to prove they had possessed the exhibits. Tr. 172, lines 9-25; p. 173, lines 1-9.

The jury question in this case was whether they "possessed" the contraband. Mr. Pinks was convicted of APC without a laboratory report of his blood alcohol level, and it is hard to envision how this jury would have acquitted the petitioners without an admittance of the laboratory report at issue. In short, any error that might be found in this case would be harmless.

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At least twice this Court has declined to hear cases that present issues and arguments similar to the petition in this case. *See City of Las Vegas* v. *Walsh*, 124 P.3d 203 (Nev. 2005) *cert. denied*, 126 S.Ct. 1786 (2006); *Napier* v. *State*, 827 N.E.2d 565 (Ind. Ct. App. 2005); *cert. denied*, 126 S.Ct.1437(2006). Certainly the Court will be presented with another case where the lower court actually ruled on the main post-*Crawford* issues involving laboratory reports and the report was germane to the verdict.

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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