No. 06-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment's Confrontation Clause permits a prosecutor to introduce a state forensic examiner's crime laboratory report against the accused as a substitute for the forensic examiner's live testimony, so long as the accused is left with the ability to subpoena the forensic examiner as part of his defense.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Thomas Pinks and Billie Jo Campbell respectfully petition for a writ of certiorari to the Supreme Court of North Dakota in *State* v. *Campbell*, Nos. 20050326, 20050337, and 20050338.

OPINION BELOW

The opinion of the North Dakota Supreme Court (App. 1a-9a) is reported at 2006 ND 168, 719 N.W.2d 374. The relevant trial court proceedings and order (App. 10a-17a) are unpublished.

JURISDICTION

The North Dakota Supreme Court decision was issued on July 27, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In 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 . . . ."

N.D. Cent. Code § 19-03.1-37 provides in relevant part:

> (4) In all prosecutions under this chapter . . . involving the analysis of a substance or sample thereof, a certified copy of the analytical report signed by the director of the state crime laboratory or the director's designee must be accepted as prima facie evidence of the results of the analytical findings.

> (5) Notwithstanding any statute or rule to the contrary, a defendant who has been found to be indigent by the court in the criminal proceeding at issue may subpoena the director or an employee of the state crime laboratory to testify at the preliminary hearing and trial of the issue at no cost to the defendant. If the director or an employee of the state crime laboratory is subpoenaed to testify by a defendant who is not indigent and the defendant does not call the witness to establish relevant evidence, the court shall order the defendant to pay costs to the witness . . . .

STATEMENT

This case presents a pressing issue concerning the administration of criminal justice in several states across the country, and over which the federal and state courts are deeply fractured.

1. Until quite recent times, this Court and others generally assumed that the Sixth Amendment required the prosecution, absent a stipulation from the defendant, to present the findings of its forensic examiners through live testimony at trial. In 1977, for example, one state court noted that, with the possible exception of chemical analyses of alcohol during the Prohibition era, "we can find no reported cases in which the very identity of the evidence as contraband has been established by hearsay" in a forensic examiner's written report. *State* v. *Henderson*, 554 S.W.2d 117, 120 (Tenn. 1977) (reciting intermediate court's observation). Although some such cases did, in fact, exist, the traditional view unquestionably was that the defendant had a right to a state-orchestrated confrontation with forensic examiners. *See*, *e.g.*, *United States* v. *Wade*, 388 U.S. 218, 227-28 (1967) (forensic analyses of fingerprints, blood samples, etc.); *Diaz* v. *United States*, 223 U.S. 442, 450

(1912) (autopsy reports). So the Tennessee Supreme Court was on solid ground in holding that:

> [I]n the face of an objection by the person charged, the State can not prove an essential element of a criminal offense by test results introduced through a witness other than the one who conducted the tests. If it were otherwise, the person charged with the offense would be denied his constitutional right to confront witnesses against him.

Henderson, 554 S.W.2d at 122.

However, following *Ohio* v. *Roberts*, 448 U.S. 56 (1980), which conflated the Confrontation Clause with hearsay law, many states began to label crime laboratory reports as "business records" or "public records," thereby rendering them admissible under the Confrontation Clause in place of the live testimony of their creators. *See* Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 508 & n.165 (2006). Even in jurisdictions that resisted characterizing crime laboratory reports as business or public records, many legislatures enacted laws specifically making such reports admissible in the prosecution's cases-in-chief in lieu of live testimony. *See id.* at 514 & n.204. States justified these laws in part on the ground that, even though the laws relieved prosecutors of the need to call forensic examiners as witnesses at trial, the laws still left defendants the ability to subpoena the prosecution's witnesses for cross-examination. *See ibid.*

These departures from traditional practice raised serious constitutional questions even during the *Roberts* era. *See, e.g.*, Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 Ohio St. L.J. 671, 674-75 (1988). And these questions have become even more significant in the wake of this Court's clarification in *Crawford* v. *Washington*, 541 U.S. 36 (2004), that "testimonial" hearsay cannot be

introduced against defendants in place of live testimony at trial.

The admissibility of state forensic examiners' crime laboratory reports in lieu of their live testimony turns, in particular, on two sub-questions, each of which deeply divides state and federal courts. First, is the Confrontation Clause automatically satisfied so long as a defendant has the ability to subpoena a witness with respect to whom the prosecution offers out-of-court statements instead of live testimony? Second, if not, are state forensic examiners' assertions in crime laboratory reports "testimonial" hearsay? This case provides an excellent vehicle to resolve both of these questions and, thus, to settle the overall confusion concerning the admissibility of crime laboratory reports as a substitute for (rather than just a supplement to) live testimony.

2. North Dakota, like many other states, currently allows prosecutors to introduce forensic examiners' reports as a "substitute" for their live testimony at trial. App. 6a. Specifically, a North Dakota statute directs courts to admit certified crime laboratory reports analyzing the chemical components of a sample "as prima facie evidence of the results of the analytical findings." N.D. Cent. Code § 19-03.1-37(4). Prosecutors need not present live testimony at trial from the forensic examiners who prepare such reports, even if defendants request that they do so. Instead, the statute leaves it to defendants, if they wish, to "subpoena the director or an employee of the state crime laboratory to testify at . . . trial." *Id.* § 19-03.1-37(5); *see also State* v. *Fischer*, 459 N.W.2d 818, 821 (N.D. 1990) (emphasizing that there is no need for prosecutor to demonstrate unavailability of forensic examiner and that the statute places responsibility on the defendant to call the forensic examiner to the stand if he wants him to testify at trial). If a non-indigent defendant subpoenas the forensic examiner but "does not call the witness to establish relevant evidence," the

statute provides that "the court shall order the defendant to pay costs to the witness." N.D. Cent. Code § 19-03.1-37(5).

3. In January 2005, Petitioners Thomas Pinks and Billie Jo Campbell were carousing at the Lewis and Clark Saloon in Washburn, North Dakota. App. 2a. While at the saloon, Petitioners got into a heated dispute with a bartender, prompting the saloon proprietor to call the police and Petitioners to leave the saloon. *Ibid.* Two police officers followed Petitioners' car and eventually stopped it. *Ibid.* During the stop, one of the officers noticed a pipe in the front part of the vehicle. *Id.* 3a. While there was nothing visible inside the pipe, the officer suspected Petitioners had used it to smoke marijuana. *Ibid.* The officers arrested Petitioners. *Ibid.* In subsequent searches, officers found what they suspected to be marijuana residue in one of Campbell's coat pockets and in a bag located in the back seat of the patrol car that transported Campbell to the police station. *Ibid.*

4. The police officers took the pipe, plastic bag, and residue from Campbell's pocket to the state crime laboratory for testing. *Id.* 12a. A state-employed forensic examiner later issued a report asserting that the residue from all three confiscated items was marijuana. *Id.* 18a-19a. "The report was signed by a state forensic scientist in his official capacity, written on letterhead from the attorney general's office, crime laboratory division, and created for purposes of providing evidence" against Petitioners. *Id.* 5a.

The report is largely conclusory. It does not describe the qualifications or experience of the forensic examiner. It does not indicate whether any recordkeeping or storage measures had been taken to preserve the integrity of the items for testing. Nor does the report identify the testing method the examiner used to arrive at his conclusion or describe any difficulties (and accompanying error rates) associated with testing mere residue for the presence of illegal drugs. *Id.* 18a-19a. The report does, however, provide what the prosecutor needed: a "solemn declaration" from a state

forensic examiner that Petitioners possessed residue of an illegal drug. *Id.* 5a (internal quotation omitted).

The State charged Pinks with possession of marijuana paraphernalia; being in actual physical control of an automobile while under the influence of alcohol or other drugs; and criminal mischief. *Id.* 3a. The State charged Campbell with possession of marijuana and marijuana paraphernalia. *Ibid.* Pinks retained counsel to defend himself, and the trial court appointed counsel to defend Campbell because she is classified under state law as indigent.

5. At trial, the prosecution offered the laboratory report during a police officer's testimony as proof that Petitioners had possessed marijuana residue. *Ibid.* Both Petitioners objected immediately "to the introduction of the report into evidence arguing that the report violated their constitutional right to confrontation because the forensic scientist who authored the report did not testify." *Ibid*. Defense counsel argued: "[T]he contents of that report are testimonial under *Crawford versus Washington*[, 541 U.S. 36 (2004)]. We have a right to confront any lab person who purports to give information in this case." *Id.* 12a. The prosecution responded that *Crawford* did not bar the report's introduction in place of the forensic examiner's live testimony because it fell under "a specific statutory provision that permits the admissibility of a certified copy of a drug lab report." *Ibid.*

Although Petitioners explained to the court that *Crawford*'s core holding was that the right to confrontation does not turn on whether evidence falls within any particular hearsay exception, *id.* 13a (*see also Crawford*, 541 U.S. at 51), the trial court admitted the report, stating without elaboration: "I don't think it is a violation, so the exhibit will be received." *Id.* 16a. Neither party ever called the state forensic examiner to the stand, so report constituted "the primary evidence offered to establish the seized property contained marijuana." *Id.* 5a-6a.

At closing argument, the State summed up the importance of the crime laboratory report to its case against Pinks, stating:

> This could be a normal tobacco pipe. It is not in this case. . . . What makes it paraphernalia is the residue that has been used to smoke marijuana, makes the distinguishment [sic] between a legal product and an illegal product. . . . That was tested and it was used as a marijuana pipe.

Tr. 178, lines 1-9 (June 13, 2005). The forensic report obviously marked the difference between Campbell's guilt and innocence as well. Although the jury acquitted Pinks of the criminal mischief charge, it found him guilty of the two drug-related charges. App. 3a. It found Campbell guilty on both counts against her. *Ibid.*

6. The North Dakota Supreme Court affirmed Petitioners' convictions, albeit disposing of their Confrontation Clause argument on different grounds than had been pressed in the trial court. Contrary to the trial court's apparent view, the North Dakota Supreme Court acknowledged that a forensic examiner's report "certainly has indicia of a testimonial statement." It "bears testimony in the sense that it is a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact'" – here, that "the residue found in the pipe, bag, and Campbell's coat pocket . . . contained marijuana." *Id.* 5a-6a. (quoting *Crawford*, 541 U.S. at 51). The North Dakota Supreme Court nevertheless held that introducing the report as a "substitute for the appearance of [the] witness," *id.* 6a, did not violate Petitioners' confrontation rights "[b]ecause neither Pinks nor Campbell attempted to subpoena the forensic scientist as provided by statute," *id.* 9a. Reasoning that all the Confrontation Clause requires is "the opportunity to confront" the prosecution's witnesses, the court emphasized that "[t]here is nothing in this record to suggest the forensic scientist was unavailable." *Ibid.* Consequently, even though

Petitioners forcefully objected at trial to the prosecution's use of testimonial hearsay as a substitute for live testimony, they had "waived their ability to complain of a constitutional violation" by not themselves subpoenaing the witness to testify in court. *Ibid.*

REASONS FOR GRANTING THE WRIT

The North Dakota Supreme Court's holding that the Confrontation Clause permits prosecutors to introduce state crime laboratory reports, over defendants' objections, as substitutes for live testimony raises two interrelated questions, each of which is the subject of an entrenched conflict among state and federal courts. First, courts are divided over whether a defendant's ability to subpoena a witness obviates the Confrontation Clause's otherwise binding requirement that the prosecution present its case through witnesses' live testimony. Second, courts are divided over whether state crime laboratory reports are testimonial. Because laboratory analyses form an integral part of so many criminal prosecutions, this Court should resolve these conflicts and make clear what the text of the Sixth Amendment and this Court's decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004), so plainly dictate: that absent a defendant's stipulation, a prosecutor may not introduce a state forensic examiner's crime laboratory report in place of the examiner's live testimony at trial – at least absent a showing that the examiner is unavailable to testify and the defendant had a prior opportunity for cross-examination.

I. The North Dakota Supreme Court's Decision Implicates Two Interdependent and Irreconcilable Conflicts Among the Federal and State Courts.

The North Dakota Supreme Court held that the Confrontation Clause permits prosecutors to introduce state

forensic examiners' crime laboratory reports as substitutes for their live testimony, so long as defendants are left with the ability to subpoena the forensic examiners as part of their defenses. This decision implicates two highly significant conflicts in the federal and state courts.

1. State courts of last resort and federal courts of appeals are divided four-to-four in the specific context of state crime laboratory reports – and eleven-to-six overall – over whether a defendant's ability to subpoena a witness obviates the Confrontation Clause's otherwise binding requirement that the prosecution present its case through live witness testimony.

The North Dakota Supreme Court in this case held that "no Sixth Amendment violation can exist" when a defendant has the ability to subpoena a witness, but fails to do so. App. 8a. It based this holding on the premise that all the Confrontation Clause requires is "the opportunity to confront" the prosecution's witnesses. *Id.* 9a. Consequently, even though Petitioners forcefully objected at trial to the prosecution using an out-of-court certification as a substitute for live testimony, the North Dakota Supreme Court ruled that they had "waived their ability to complain of a constitutional violation" by not themselves subpoenaing the witness to testify in court. *Ibid.*; *accord State* v. *Manke*, 328 N.W.2d 799 (N.D. 1982). Three other state high courts likewise have held that defendants' statutory ability to subpoena forensic examiners and others who produce prosecutorial laboratory reports automatically renders the reports constitutionally admissible even without live testimony. *See Howard* v. *United States*, 902 A.2d 127, 135 (D.C. 2006) (defendant "waived his right to confront the chemist" by failing to subpoena him); *State* v. *Hughes*, 713 S.W.2d 58, 62 (Tenn. 1986) ("[T]he accused waives the right of confrontation if the laboratory technician is not

subpoenaed . . . .");[1] *State* v. *Smith*, 323 S.E.2d 316, 328 (N.C. 1984) (a defendant's "[f]ailure to summon the analyst results in a waiver" of right to confrontation because the defendant "is entitled to subpoena the analyst and examine him as an adverse witness").[2]

Two state high courts have issued analogous rulings in the child hearsay context, where prosecutors have offered children's out-of-court interviews in lieu of their live testimony. *See State* v. *Oscarson*, 845 A.2d 337, 347 (Vt. 2004) (prosecution need not call available child witness to

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[1] The Tennessee Court of Criminal Appeals recently reaffirmed that "[t]he rule in *Hughes* controls" in that State. *State* v. *Kemper*, 2004 WL 2218471, at *3 (Tenn. Crim. App. Sept. 30, 2004), *appeal denied* (Tenn. 2005).

[2] The North Dakota Supreme Court asserted that the Nevada Supreme Court's decision in *City of Las Vegas* v. *Walsh*, 124 P.3d 203 (Nev. 2005), *cert. denied*, 126 S. Ct. 1786 (2006), also comported with its holding here. App. 8a. But *Walsh* actually involved a different type of procedural hurdle that a handful of states impose on defendants with respect to requiring forensic examiners to give live testimony – namely, a prerequisite that defendants make a pretrial showing that there is a good faith basis to contest a forensic examiner's report. *See* 124 P.3d at 208. The validity of such "good faith" requirements is not at issue here because, if defendants make such a showing under those statutes, then *the prosecution* must put the forensic examiners on the stand at trial. *See id.* at 208 (discussing Nev. Rev. Stat. § 50.315 (2004)); *see also State* v. *Crow*, 974 P.2d 100 (Kan. 1999). Nor is the validity of so-called "notice and demand" statutes – under which some states require defendants to request a forensic examiner's presence a certain amount of time in advance of trial – at issue here. If such threshold demand requirements are satisfied, then those statutes, like "good faith" provisions, require the examiner to "testify in person at the trial *on behalf of the state*." *State* v. *Caulfield*, ___ N.W.2d ___, 2006 WL 2828676, at *5 (Minn. Oct. 5, 2006) (quoting Minn. Stat. § 634.15 (2006)) (emphasis added). *See generally* Richard D. Friedman, *Lab Reports and a Notice-and-Demand Statute – A Significant Decision from Minnesota*, http://confrontationright.blogspot.com/2006/10/lab-reports-and-notice-and-demand.html (Oct. 6, 2006) (distinguishing notice-and-demand statutes from the type of "defendant must subpoena" requirement at issue here).

the stand because "[t]here is no constitutional requirement that [a prosecution witness] testify on direct"); *State* v. *Schaal*, 806 S.W.2d 659, 663 (Mo. 1991) (Confrontation Clause satisfied because the child was available at trial and "it is only the opportunity for effective cross-examination that must be afforded under the Sixth Amendment"). One other state appellate court also has upheld the prosecution's introduction of a child's videotaped statement in lieu of live testimony because she was available in the courthouse but not called by the defendant to the stand. *See Starr* v. *State*, 604 S.E.2d 297, 299 (Ga. Ct. App. 2004).

In direct contrast to these rulings, three federal courts of appeals and eight state high courts have held that the Confrontation Clause forbids the prosecution from introducing its witnesses' testimony through hearsay and leaving it to defendants to decide whether to subpoena the witnesses. Under these rulings, the prosecution must put its own witnesses on the stand (at least when those witnesses are available) or their hearsay statements are inadmissible. Four of these decisions deal specifically with forensic examiners who prepare crime laboratory reports, six deal with child witnesses, and one deals with another type of witness.

In *People* v. *McClanahan*, 729 N.E.2d 470 (Ill. 2000), for example, the Illinois Supreme Court confronted the prosecution's argument that it legitimately offered a crime laboratory report without live testimony from the forensic examiner who prepared it "because [the defendant] can always subpoena the preparer of the report and cross-examine him as a hostile witness." *Id.* at 477. The court "emphatically reject[ed] any notion that the State's constitutional obligation to confront the accused with the witnesses against him can be satisfied by allowing the accused to bring the State's witnesses into court himself and then cross-examine them as part of his defense." *Ibid.* The Illinois Supreme Court further reasoned that the Sixth Amendment:

> guarantee[s] a defendant the right "to be confronted with the witnesses against him." The wording of th[is] provision[] is significant. [It does] not say that the accused has a right *to confront the witnesses* against him; it say[s] that the accused has a right *to be confronted with* the witnesses against him. This is a mandatory constitutional obligation of the prosecuting authority. It arises automatically at the inception of the adversary process, and no action of the defendant is necessary to activate this constitutional guarantee in his case.

Ibid. (emphasis in original).

Other courts holding the same in this context have followed similar reasoning. *See United States* v. *Oates*, 560 F.2d 45, 82 n.39 (CA2 1977) ("[T]he right of confrontation is broader than the right to cross-examination, and it is the prosecutor who should have the burden of producing witnesses against the defendant.") (internal citations omitted);[3] *State* v. *Coombs*, 821 A.2d 1030, 1033 (N.H. 2003) (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") (internal quotation omitted); *Barnette* v. *State*, 481 So. 2d 788, 792 (Miss. 1985) (it "impermissibly lessens the constitutionally required burden which is on the state to prove each element of the offense beyond a reasonable doubt, and violates the defendant's right of confrontation" to allow a prosecutor, over defendant's objection, to introduce laboratory report in place of live testimony); *Belvin* v. *State*, 922 So. 2d 1046, 1054 (Fla. Dist. Ct. App. 2006) ("Not only does a defendant have no burden to produce constitutionally necessary evidence of guilt, but he has the right to stand silent during the state's case in chief, all the while insisting that the state's proof satisfy constitutional requirements.")

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[3] The Second Circuit reaffirmed this holding in *United States* v. *Check*, 582 F.2d 668, 683 (CA2 1978).

(internal citations omitted), *rev. granted*, 928 So. 2d 336 (Fla. 2006).

Numerous courts in the child hearsay context have been equally emphatic in rejecting the argument that the prosecution may offer its witnesses' testimony through hearsay so long as defendants are left with the ability to subpoena the witnesses for cross-examination. The Washington Supreme Court, for example, has reasoned that:

> The opportunity to cross examine means more than affording the defendant the opportunity to hail the witness to court for examination. It requires the State to elicit the damaging testimony from the witness so the defendant may cross examine if he so chooses.

State v. *Rohrich*, 939 P.2d 697, 700-01 (Wash. 1997) (footnote omitted). The Fifth Circuit has further explained that "the prosecution's initial call for the witness to testify . . . is crucial to the [waiver] inquiry. Only when that is done does the failure of the defense to cross-examine the witness constitute a waiver." *Lowery* v. *Collins*, 996 F.2d 770, 772 (CA5 1993). Other decisions are in accord. *See Schaal* v. *Gammon*, 233 F.3d 1103, 1107 (CA8 2000) ("[T]his type of burden-shifting is impermissible and not sufficient to satisfy the Confrontation Clause."); *Snowden* v. *State*, 867 A.2d 314, 332 (Md. 2005) ("In a criminal trial, the State is required to place the defendant's accusers on the stand so that the defendant both may hear the accusations against him or her stated in open court and have the opportunity to cross-examine those witnesses."); *Long* v. *State*, 742 S.W.2d 302, 321 (Tex. Crim. 1987) (the defendant cannot be "required to call as a witness the accuser in order to enjoy the fundamental right of cross-examination"), *overruled on other grounds*, *Briggs* v. *State*, 789 S.W.2d 918 (Tex. Crim. 1990).[4] Courts have held similarly with respect

[4] *See also Bratton* v. *State*, 156 S.W.3d 689, 694 (Tex. App.) ("[W]e find nothing in *Crawford* or elsewhere suggesting that a defendant waives his right to confront a witness whose testimonial statement was admitted into

to other types of witnesses. *See State* v. *Fisher*, 563 P.2d 1012, 1018 (Kan. 1977) ("[F]or the declarant to be subject to full and effective cross-examination by the defendant, he must be called to testify by the state."); *State* v. *Cox*, 876 So. 2d 932, 938 (La. Ct. App. 2004) ("Defendant should not be required to call Mrs. Sykes as a witness simply to facilitate the State's introduction of evidence against the Defendant.").

The fact that the Eighth Circuit falls in the group requiring the prosecution to present its case through live witness testimony makes this Court's review especially necessary here. *See Schaal*, 233 F.3d at 1106-07 (granting habeas relief because state court's "waiver" analysis unconstitutionally shifted burden to defendant to call prosecution's witness). Under the current state of affairs, defendants in federal court in North Dakota can force prosecutors to put their witnesses on the stand, while defendants in state court cannot. Worse yet, if state prosecutors proceed under the decision at issue here, any convictions are subject to federal habeas corpus challenge. This type of uncertainty – in and of itself – strongly militates in favor of certiorari review.

2. State and federal courts also are split over the question of whether state crime laboratory reports are testimonial. This Court's conception of the Confrontation Clause in *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980), allowed trial courts to admit out-of-court statements as evidence against criminal defendants if the statements fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Crawford* abrogated *Roberts*, holding that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Crawford*, 541 U.S. at 61. "Testimonial" hearsay statements, therefore, are admis-

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evidence by failing to call him as a witness at trial."), *rev denied* (Tex. Crim. 2005).

sible only if the witness is "unavailable to testify, and the defendant had [] a prior opportunity for cross-examination." *Id.* at 54. Although this Court elected to "leave for another day any effort to spell out a comprehensive definition of 'testimonial,'" *id.* at 68, – and did so again last Term in *Davis* v. *Washington*, 126 S. Ct. 2266 (2006), – it noted that a paradigmatic testimonial statement is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact" in a criminal trial. *Crawford*, 541 U.S. at 51 (internal quotation omitted).

Drawing on this language, the North Dakota Supreme Court observed 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'" – namely, "establishing [that] the content of the residue" the police seized from Petitioners and purportedly provided to the forensic examiner was marijuana. App. 5a (quoting *Crawford*, 541 U.S. at 51) (internal quotation and citation omitted). Although the court stopped short of squarely holding that state laboratory reports are testimonial – resolving the case instead on waiver-by-failure-to-subpoena grounds – seven other courts (including two other state courts of last resort) have used similar reasoning explicitly to hold that such reports are testimonial. *See State* v. *Caulfield*, ___ N.W.2d ___, 2006 WL 2828676, at *3-4 (Minn. Oct. 5, 2006) (state forensic examiner's report identifying substance as an illegal drug is testimonial because it is "clearly prepared for litigation" and "function[s] as the equivalent of testimony on the identification of the substance seized from [the defendant]"); *City of Las Vegas* v. *Walsh*, 124 P.3d 203, 208 (Nev. 2005) (nurse's affidavits authenticating and outlining standard blood-testing procedures are testimonial because "they are made for use at a later trial or legal proceeding"), *cert. denied*, 126 S. Ct. 1786 (2006); *State* v. *Miller*, ___ P.3d ___, 2006 WL 2820978, at *1 (Or. Ct. App. Oct. 4, 2006) (urinalyses and drug residue analysis reports

are testimonial because they are solemn declarations "clearly intended to be used in a criminal prosecution to prove past events"); *State* v. *Rogers*, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004) (blood test was testimonial because it was "initiated by the prosecution and generated by the desire to discover evidence"); *Martin* v. *State*, ___ So. 2d ___, 2006 WL 2482442 (Fla. Dist. Ct. App. Aug. 30, 2006) (drug analysis report);[5] *State* v. *Berezansky*, 899 A.2d 306, 312-13 (N.J. Super. Ct. App. Div. 2006) (laboratory report analyzing blood-alcohol content); *People* v. *Lonsby*, 707 N.W.2d 610 (Mich. Ct. App. 2005) (laboratory report testing for presence of semen), *motion for appeal denied*, 720 N.W.2d 724 (Mich. 2006); *State* v. *Crager*, 844 N.E.2d 390 (Ohio Ct. App. 2005) (DNA test), *appeal allowed*, 846 N.E.2d 533 (Ohio 2006). Two other courts have suggested they agree with this view. *See United States* v. *Rahamin*, 168 Fed. App'x 512, 520 (CA3 2006) (noting drug analysis report "appear[ed] testimonial" but resolving case on harmless-error grounds); *United States* v. *Magyari*, 63 M.J. 123, 127 (C.A.A.F. 2006) (unpublished opinion) (holding a random, administrative urinalysis report is nontestimonial but noting "the same types of records . . . prepared at the behest of law enforcement in anticipation of a prosecution" may be testimonial), *petition for cert. filed* (No. 06-265).

Finally, the New Hampshire Supreme Court likewise has ruled that introducing a crime laboratory report purporting to establish the presence of a controlled substance without live testimony of the forensic examiner violates a defendant's confrontation rights. *See State* v. *Coombs*, 821 A.2d 1030, 1032 (N.H. 2003). Although the New Hampshire Supreme

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[5] Multiple districts of the Florida Court of Appeals have addressed this issue and all have ruled that laboratory reports are testimonial. *See Belvin* v. *State*, 922 So. 2d 1046 (Fla. Dist. Ct. App.) (blood-alcohol breath test), *re*v. *granted*, 928 So. 2d 336 (2006); *Johnson* v. *State*, 929 So. 2d 4 (Fla. Dist. Ct. App. 2005) (drug identification test), *re*v. *granted*, 924 So. 2d 810 (Fla. 2006).

Court issued its decision before *Crawford*, it drew heavily on Justice Thomas's concurrence in *White* v. *Illinois*, 502 U.S. 346, 363 (1992), which first advanced the testimonial concept, and reasoned that "a laboratory test used to prove an essential element of a criminal offense constitutes [the type of] *ex parte* affidavit" that the Confrontation Clause was designed to cover. *Coombs*, 821 A.2d at 1032.

On the other hand, one federal court of appeals, three state courts of last resort, and three intermediate state appellate courts have held that prosecutorial laboratory reports like the one at issue here are not testimonial. *See United States* v. *Ellis*, 460 F.3d 920, 925 (CA7 2006) (analysis of bodily fluids for presence of illegal drugs); *Commonwealth* v. *Verde*, 827 N.E.2d 701, 705 (Mass. 2005) (certificate of chemical analysis identifying a sample as an illegal drug); *State* v. *Dedman*, 102 P.3d 628, 636 (N.M. 2004) (blood test for presence of illegal drugs); *State* v. *Forte*, 629 S.E.2d 137, 142-44 (N.C. 2005) (DNA analysis); *Pruitt* v. *State*, ___ So. 2d ___, 2006 WL 1793732 (Ala. Crim. App. June 30, 2006) (certificate of chemical analysis identifying illegal drug); *People* v. *Johnson*, 18 Cal. Rptr. 3d 230, 233 (Cal. Ct. App. 2004) (same); *State* v. *March*, ___ S.W.3d ___, 2006 WL 1791336 (Mo. Ct. App. June 30, 2006) (same).

These courts do not dispute that state crime laboratory reports are solemn declarations designed to create evidence in criminal prosecutions. They reason, however, that these reports are not testimonial for two reasons. First, some courts assert that state crime laboratory reports are "neither discretionary nor based on opinion," and thus are so trustworthy that they do not "implicate the principal evil at which the Confrontation Clause was directed": governmental manipulation of testimony. *Verde*, 827 N.E.2d at 706 (quotation omitted); *see also Pruitt*, ___ So. 2d ___, 2006 WL 1793732, at *5 (forensic reports are "grounded in inherently trustworthy and reliable scientific testing, rather

than opinionated assertions"). Second, some courts have emphasized that many jurisdictions' modern hearsay law treats crime laboratory reports as business records and that this Court stated in passing in *Crawford* that business records – at least as that concept was understood at the Founding – are by their nature nontestimonial. *See Ellis*, 460 F.3d at 925; *Forte*, 360 N.C. at 435.[6]

This conflict over the nature of forensic examiners' state crime laboratory reports is now deeply entrenched. The North Dakota Supreme Court and several other courts have acknowledged this split, and courts now are simply choosing sides. *See, e.g.*, App. 6a-7a; *Caulfield*, ___ N.W.2d at ___, 2006 WL 2828676, at *4; *March*, ___ S.W.3d at ___, 2006 WL 1791336, at *4 n.4. Nothing could be gained from further percolation. Indeed, when these courts' disparate treatment of similarly situated defendants is combined with courts' confusion over whether a defendant's ability to subpoena a forensic examiner can obviate the need to delve into the problem at all, it is clear beyond peradventure that there is no way that the lower courts will untangle the law in this area themselves. It is time for this Court to step in.

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[6] What is more, three state courts of last resort and two intermediate state courts have invoked these same lines of reasoning to hold that autopsy reports used in homicide prosecutions are at least in part nontestimonial. *See State* v. *Craig*, 853 N.E.2d 621, 639 (Ohio 2006) (wholly nontestimonial); *State* v. *Lackey*, 120 P.3d 332, 348-52 (Kan. 2005) (objective observations in autopsy reports are nontestimonial, while "opinions" are testimonial); *Rollins* v. *State*, 897 A.2d 821, 844-46 (Md. 2006) (same); *Moreno Denoso* v. *State*, 156 S.W.3d 166, 182 (Tex. App.) (wholly nontestimonial), *rev. denied* (Tex. Crim. 2005); *People* v. *Durio*, 794 N.Y.S.2d 863, 869 (N.Y. Sup. Ct. 2005) (wholly nontestimonial).

II. The North Dakota Supreme Court's Decision Misconstrues the Confrontation Clause.

Although this Court has never squarely decided the issue, it has explicitly assumed on several occasions that, absent a defendant's stipulation, the prosecution may not introduce a crime laboratory report as a substitute for presenting live testimony from a forensic examiner. As early as 1912, this Court stated that certain pretrial "testimony" including an autopsy report "could not have been admitted without the consent of the accused . . . because the accused was entitled to meet the witnesses face to face . . . ." *Diaz* v. *United States*, 223 U.S. 442, 450 (1912).[7] Years later, this Court noted that when the government performs "scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like[,] . . . the accused has the opportunity for a meaningful confrontation of the Government's case at trial." *United States* v. *Wade*, 388 U.S. 218, 227-28 (1967). Similarly, in refusing to recognize a due process right to have the government preserve breath samples, this Court observed that "the defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise doubts in the mind of the factfinder whether the test was properly administered." *California* v. *Trombetta*, 467 U.S. 479, 490 (1984).

This Court's instincts have been correct. Because state crime laboratory reports "bear[] testimony," App. 5a, they cannot – over a defendant's objection – act as a substitute for presenting the live testimony of a forensic examiner at trial. The North Dakota Supreme Court erred in holding otherwise.

1. A defendant's ability to subpoena a forensic examiner (or any other prosecution witness) as part of his defense is not enough to satisfy the Confrontation Clause. The Clause

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[7] This Court in *Diaz* was discussing the Philippine Constitution's counterpart to the Confrontation Clause, but the Court proceeded on the basis that the two provisions confer the same protection. 223 U.S. at 450-51.

guarantees a defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. This language implies that it is the prosecution's responsibility to arrange the confrontation, not the defendant's.

This Court's precedent comports with this textual understanding. In *Taylor* v. *Illinois*, 484 U.S. 400 (1988), this Court explained that the right to confrontation, like most other Sixth Amendment rights, "arise[s] automatically on the initiation of the adversary process and no action by the defendant is necessary to make [it] active in his or her case." *Id.* at 410. More specifically, the right to confrontation is "designed to restrain the prosecution *by regulating the procedures by which it presents its case against the accused*. [It applies] in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own." *Id.* at 410 n.14 (emphasis added) (quotation omitted). This means that a defendant who invokes his right to confrontation does not "waive" it by failing to subpoena the witness at issue; once a defendant objects to the prosecution's introduction of testimonial hearsay of an available witness, the prosecution must call the witness to the stand or forego introducing the out-of-court statement.

Indeed, the North Dakota Supreme Court's conception of the Confrontation Clause would render it an entirely superfluous constitutional right. The Sixth Amendment's Compulsory Process Clause – which guarantees defendants the right "to have compulsory process for obtaining witnesses in [their] favor," U.S. Const. amend. VI – already gives defendants the right to "compel a witness' presence in the courtroom" for a live examination. *Taylor*, 484 U.S. at 409. The North Dakota Supreme Court's decision thus effectively holds that the Confrontation Clause affords a defendant nothing that the Compulsory Process Clause does not already give him. This result contravenes the "first principle of constitutional interpretation," which is that "every word must have its due force, and appropriate

meaning." *Wright* v. *United States*, 302 U.S. 583, 588 (1938) (quotation omitted). "[N]o word" in the Constitution "was unnecessarily used, or needlessly added." *Ibid.*

This is especially true with respect to the "bedrock procedural guarantee," *Crawford*, 541 U.S. at 42, that the Confrontation Clause secures. Allowing the prosecution to present its case through extrajudicial declarations – subject only to defendants' subpoena power – deprives defendants of the ancient right to stand "face-to-face" with adverse witnesses as the witnesses convey incriminating evidence on direct examination. "A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts." *Coy* v. *Iowa*, 487 U.S. 1012, 1019 (1988) (internal quotation omitted). In addition, requiring defendants to subpoena the prosecution's witnesses subverts defendants' ability to challenge the prosecution's case. Instead of having the right to undertake cross-examination with little risk of worsening the evidentiary record or alienating the jury, defendants are forced to gamble that calling the witness to the stand will generate such powerful impeachment evidence that the jury will understand why the defense wanted to present the witness' testimony. *See Lowery*, 996 F.2d at 772; *Rohrich*, 939 P.2d at 700-01. Even if a defendant is permitted to call a prosecution witness to the stand as a hostile witness, this "is no substitute for cross-examining that declarant *as a state's witness*." *Fisher*, 563 P.2d at 1017 (emphasis added); Richard D. Friedman, *Shifting the Burden*, http://confrontationright.blogspot.com/2005/03/shifting-burden.html (Mar. 16, 2005). "The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot." *State* v. *Saporen*, 285 N.W. 898, 901 (Minn. 1939).

Lest there be any remaining doubt, the North Dakota Supreme Court's waiver-unless-subpoena rule leads to patently unacceptable results. As the Illinois Supreme Court has recognized, this rule, taken to its logical conclusion, "necessarily mean[s] that there would be no constitutional problem with allowing the State to introduce all of its evidence by affidavit as long as the defendant is allowed to bring the prosecution's witnesses into court himself." *McClanahan*, 729 N.E.2d at 477. Indeed, a recent decision from the Georgia Court of Appeals appears to sanction just that result. *See Starr* v. *State*, 604 S.E.2d 297, 299 (Ga. Ct. App. 2004). There, the court allowed the prosecution to introduce an alleged victim's videotaped interview in lieu of her live testimony because she was available in the courthouse during trial and the *defendant* never called her to the stand. *Ibid.*

It is difficult to conceive of a scenario more offensive to the Confrontation Clause. "The primary object" of the Clause is "to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination . . . of the witness . . . ." *Mattox* v. *United States*, 156 U.S. 237, 242 (1895); *accord Crawford*, 541 U.S. at 50; *California* v. *Green*, 399 U.S. 149, 157 (1970). No conception of the Confrontation Clause that permits – indeed, invites – prosecution-by-*ex-parte*-interview can be correct.

2. A laboratory report, prepared by a state forensic examiner to further a criminal investigation, constitutes quintessentially testimonial evidence. In *Crawford*, this Court observed 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." 541 U.S. at 50; *see also Mattox*, 156 U.S. at 242 (clause intended to prohibit "ex parte affidavits" in place of live testimony). "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential

for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar." *Crawford*, 541 U.S. at 56 n.7.

It takes little effort to see that state forensic examiners' crime laboratory reports fall squarely within this class. Forensic examiners create such laboratory reports at the behest of law enforcement "for use at a later trial or legal proceeding." *Walsh*, 124 P.3d at 208. Such reports are "solemn declaration[s]." App. 4a (quoting *Crawford*, 541 U.S. at 51). And such reports are forthrightly offered "in lieu of [the examiners'] live testimony." *Walsh*, 124 P.3d at 208; *see also* App. 6a (reports offered as a "substitute for the appearance of a witness").

Neither of the rationales that courts have invoked to characterize forensic examiners' laboratory reports as nontestimonial evidence provides any reason to retreat from this conclusion. Courts' reliance on the supposedly "inherently trustworthy and reliable [nature of] scientific testing," *Pruitt*, ___ So. 2d ___, 2006 WL 1793732, at *5, is nothing more than *Roberts redux*. Even assuming for the moment that these courts' assessment of the reliability of forensic testing is correct, this Court expressly rejected such legal reasoning in *Crawford*: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." 541 U.S. at 62. Trial courts must require testimony to be presented through the adversarial process, regardless of whether they surmise that cross-examination will likely bear fruit. *Ibid.*

Nor does *Crawford*'s reference to business records support deeming forensic reports nontestimonial. The common law "shop book rule" exception for regularly kept business records, to which *Crawford* adverted, *see* 541 U.S. at 56, did not remotely encompass reports generated for prosecutorial use. *See Palmer* v. *Hoffman*, 318 U.S. 109, 113-14 (1943) (explaining that records "calculated for use

essentially in the court" or whose "primary utility is in litigating" fall outside of common law rule, and declining to expand federal exception to allow their admission); *Miller*, ___ P.3d at ___, 2006 WL 2820978, at *7-8 (tracing history of business records exception and concluding that state crime laboratory reports fall far outside historical exception). Even as recently as the 1970's, the drafters of the Federal Rules of Evidence declined to expand the "public records" exception in criminal cases to include "matters observed by police officers and other law enforcement personnel" and "factual findings resulting from an investigation." Fed. R. Evid. 803(8). They took this action "in view of the almost certain collision with confrontation rights which would result from [such records'] use against the accused in a criminal case." Advisory Committee's Notes, Note to Paragraph (8) of Rule 803, 56 F.R.D. 313 (1972). *See generally Oates*, 560 F.2d at 68-73.

It makes no difference that some jurisdictions have since decided to expand their definitions of business records and public records to include state crime laboratory reports. As this Court emphasized in *Crawford*, the reasons for subjecting testimonial statements to confrontation procedures "do[] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." 541 U.S. at 56 n.7. Jurisdictions may no more insulate state crime laboratory reports from confrontation scrutiny by labeling them business records as they could by giving the same label to transcripts of custodial interrogations, which, after all, police conduct in their ordinary course of business.

III. The Question Presented Significantly Impacts the Administration of Criminal Justice.

For at least three reasons, the question presented is the kind of critical constitutional issue that warrants this Court's review.

1. Crime laboratory analyses play a central evidentiary role in a large number of criminal trials. Prosecutions that lack direct evidence of the perpetrator depend heavily on scientific evaluations of circumstantial evidence. Forensic analyses, of course, also are at the center of many drug prosecutions, such as the one here. And given the onward march of technology, criminal prosecutions in the future promise to rely, if anything, even more on scientific analysis. The new practice of prosecutorial DNA testing is only a glimpse of what is likely to come.

2. The question presented implicates practices across the country. Forty-four states and the District of Columbia have hearsay exceptions permitting courts to admit forensic examiners' certified reports to establish the identity of controlled substances. Metzger, 59 Vand. L. Rev. at 478 & n.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." *Id.* at 479 (collecting citations).

While several states within this group – including Texas, Ohio, and Oregon – have long required prosecutors, upon objections from defendants, to present live testimony from the state forensic examiners who prepare such reports,[8]

[8] Twelve states have statutes providing that defendants need only request their live testimony for prosecutors to have to put them on the stand at trial. *See* Metzger, 59 Vand. L. Rev. at 481-82 & n.23. Still other states have construed statutes appearing to impose greater burdens on defendants as requiring nothing more than an invocation of the right to

several other states have burden-shifting statutes like North Dakota's, which put the onus on defendants to decide whether to subpoena forensic examiners as part of their defense. *See, e.g.*, Ark. Code Ann. § 12-12-313 (2006); D.C. Code § 48-905.06 (2006); Idaho Code Ann. § 37-2745(d) (2006); R.I. Gen. Laws § 9-19-43 (2006). Numerous other states, as well as some federal decisions interpreting the federal business-records exception, also make forensic laboratory reports admissible for the truth of the matters asserted without providing any procedural device for defendants to request that prosecutors put the examiners on the stand. *See, e.g.*, Mass. Gen. Laws ch. 111, § 13 (2006); Va. Code § 19.2-187 (2006); *United States* v. *Baker*, 855 F.2d 1353, 1359 (CA8 1988) ("When made on a routine basis, laboratory analyses of controlled substances are admissible as business records under Federal Rule of Evidence 803(6)."). Because the Compulsory Process Clause grants all defendants the same subpoena power that North Dakota and other states have formally codified, *see Taylor*, 484 U.S. at 409, these jurisdictions also could apply the North Dakota Supreme Court's analysis to hold that defendants must either call forensic examiners to the stand – at least to the extent the examiners are available – or "waive" their right to confrontation.

3. The unchecked use of state crime laboratory reports in place of live testimony undermines the integrity of the criminal justice system. Recent reports have shown that "tainted or fraudulent science" contributes to a large proportion – perhaps one-third – of wrongful convictions. *See* Barry Scheck et al., Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted 246 (2000); *see also* Metzger, 59 Vand. L. Rev. at 491-500 (detailing numerous examples).

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confrontation for the prosecutor present live testimony. *See, e.g.*, *Miller*, ___ P.3d at ___, 2006 WL 2820978, at *9.

These errors derive from several factors. First, many prosecutorial crime laboratories use undependable protocols. One study revealed that 30% of state forensic examiners asked to test a substance for the presence of cocaine rendered incorrect results. *See* U.S. Dep't of Justice, Project Advisory Committee, *Laboratory Proficiency Testing Program, Supplementary Report – Samples 6-10*, at 3 (1976). 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). Second, a substantial number of crime laboratories are not even required to follow any standardized procedures. "[O]f the 400-500 laboratories conducting forensic examinations for criminal trials, only 283 are accredited." Metzger, 59 Vand. L. Rev. at 494. Finally, many forensic examiners, as employees in state attorney general and district attorneys offices, are prone to prosecutorial bias. This bias can subconsciously influence examiners' conclusions or cause them outright to manipulate evidence. Recent scandals in Baltimore, Phoenix, and Houston, for example, have revealed rampant falsification of evidence in those cities' crime laboratories. *See id.* at 495 & n.83.

These realities demand that state forensic examiners' evidentiary certifications be subject to the ordinary processes of direct and cross-examination. If state forensic examiners understand that they may have to present and defend their work in front of judges and juries at public trials, they are more likely to be careful and conscientious. And when examiners do make mistakes or commit malfeasance, our judicial system's traditional adversarial process is more likely than a system of trial-by-affidavit to uncover the truth. There is no doubt our Framers understood this, and the time has come to reaffirm this time-tested principle.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2006

APPENDIX A

Filed 7/27/06 by Clerk of Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2006 ND 168

State of North Dakota, Plaintiff and Appellee

v.

Billie Jo Campbell, Defendant and Appellant

No. 20050326

State of North Dakota, Plaintiff and Appellee

v.

Thomas David Pinks, Defendant and Appellant

Nos. 20050337 & 20050338

Appeals from the District Court of McLean County,
South Central Judicial District,
the Honorable Thomas J. Schneider, Judge.

Kapsner, Justice.

[¶1] In these consolidated cases, Thomas Pinks appeals from a judgment of conviction for being in actual physical control of an automobile while under the influence of alcohol or other drugs and possession of marijuana paraphernalia, and Billie Campbell appeals from a judgment of conviction for possession of marijuana and marijuana paraphernalia. Both claim the admission of a state crime laboratory report violated their Sixth Amendment right to confrontation because the report was a testimonial statement under the holding of *Crawford v. Washington*, 541 U.S. 36 (2004). 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. Because Pinks and Campbell failed to avail themselves of their opportunity to subpoena the author of the state crime laboratory report, they have waived any potential Confrontation Clause violation. We affirm the trial court's judgments entered on jury verdicts.

I

[¶2] In mid-January 2005, Pinks and Campbell were confronted about being drug users by a barkeep at the Lewis and Clark Saloon in Washburn. A heated dispute ensued. There was testimony that bar glasses were thrown and a chair was broken over the bar. The proprietor of the saloon called the police. Pinks and Campbell left the scene in a Blazer with its rear window frosted over. The police followed and stopped the Blazer but were unable to confirm who was driving the vehicle because of the frosted windows. When the police officers reached the vehicle, they noticed Pinks was in the front passenger seat and Campbell was in the rear seat. The officer asked who had been the driver. Both stated the driver had run away before the officer arrived. The officer stated that was impossible because there was no tracks in the snow and he did not notice anyone leave the vehicle during his pursuit. Pinks explained the driver jumped out while the vehicle was moving and he had to reach over,

hit the brakes, put the vehicle in park, and shut off the engine.

[¶3] During the stop, one of the officers noticed a pipe in the front part of the vehicle, a pipe of the type the officer knew was typically used to smoke marijuana. The officer determined Pinks must have thrown it there. Pinks and Campbell were arrested and transported to the police station in separate cars. During a search of the backseat of the patrol car that transported Campbell, officers found a bag they believed contained marijuana residue. Other residue believed to be marijuana was found in one of Campbell's coat pockets. Pinks was charged with being in actual physical control of an automobile while under the influence of alcohol, criminal mischief, and possession of marijuana paraphernalia. Campbell was charged with possession of marijuana and marijuana paraphernalia.

[¶4] At trial, the State relied on a certified report from the state crime laboratory. The report stated the evidence seized from Pinks and Campbell was marijuana. Both Pinks and Campbell objected to the introduction of the report into evidence arguing the report violated their constitutional right to confrontation because the forensic scientist who authored the report did not testify. Neither party subpoenaed the author of the report.

[¶5] After receiving the report into evidence, a jury convicted Campbell of all charges. Pinks was found guilty for possession of drug paraphernalia and being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or other drugs, and acquitted of the criminal mischief charge. On appeal, both Pinks and Campbell raise the single issue of whether the district court erred in admitting the state crime laboratory report in violation of their constitutional right to confront their accusers.

II

[¶6] The Confrontation Clause provides 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. Our standard of review for a claimed violation of a constitutional right, including the right to confront an accuser, is de novo. *State v. Blue*, 2006 ND 134, ¶ 6. As we recognized in *Blue*, the United States Supreme Court has redefined the federal right to confrontation. *Id.* at ¶ 7. In *Crawford v. Washington*, 541 U.S. 36, 59 (2004), the Supreme Court held the admission of out-of-court testimonial statements in criminal cases is precluded, unless, when the witness is unavailable to testify, the accused has had a prior opportunity to cross-examine the declarant. Without adopting a precise definition for what constitutes a testimonial statement, the court recognized that testimony means a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (citing definition of testimony from 1 N. Webster, *An American Dictionary of the English Language* (1828)).

[¶7] In *Blue*, 2006 ND 134, ¶ 9, we noted the *Crawford* court's various formulations defining testimonial statements. Testimonial statements could refer to three classes of statements:

> ex parte in-court testimony or its functional equivalent, which includes such things 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. . . . out-of-court statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. . . . The final class described by the Supreme Court is comprised of testimonial statements made under circumstances which would lead an objective witness reasonably to believe that the

> statement would be available for use at a later trial.

Id. (citations and quotation marks omitted).

[¶8] We also recognized that *Davis v. Washington*, 126 S. Ct. 2266 (2006) gave further guidance regarding the distinction between testimonial and nontestimonial statements.

> 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.

Blue, at ¶ 11 (citing *Davis*, 126 S. Ct. at 2273-74). We stated that whether an individual was acting as a witness and in essence "testifying" should be determined by looking to the surrounding circumstances of when a report is made, the nature of the report given, the level of formality when making a report, and the purpose of the report. *Id.* (citing *Davis*, 126 S. Ct. at 2276-77).

[¶9] In this case, 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." *Crawford*, 541 U.S. at 51 (citing definition of testimony from 1 N. Webster, *An American Dictionary of the English Language* (1828)). The report was signed by a state forensic scientist in his official capacity, written on letterhead from the attorney general's office, crime laboratory division, and created for purposes of providing evidence under N.D.C.C. § 19-03.1-37(4). The report was created for the purpose of establishing the content of the residue found in the pipe, bag, and Campbell's coat pocket, and was the primary

evidence offered to establish the seized property contained marijuana. This procedure is authorized by statute.

[¶10] Section 19-03.1-37(4), N.D.C.C., provides:

> In all prosecutions under this chapter, chapter 19-03.2, or chapter 19-03.4 involving the analysis of a substance or sample thereof, a certified copy of the analytical report signed by the director of the state crime laboratory or the director's designee must be accepted as prima facie evidence of the results of the analytical findings.

This statute acts as a substitute for the appearance of a witness who would testify: "I am the director of the state crime laboratory or the director's designee. This substance was analyzed and it was determined to be marijuana."

[¶11] The certified report certainly has indicia of a testimonial statement in light of *Crawford* and *Davis*. To date, courts are split as to whether a lab report such as the one at issue here is testimonial.[1] However, because of our

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[1] *See State v. March*, No. 27102, 2006 Mo. App. LEXIS 998, *12 n.4 (Mo. Ct. App. June 30, 2006) (compiling a list of jurisdictions addressing whether a lab report is testimonial). *See, e.g., United States v. Rahamin*, 168 Fed. Appx. 512, 520 (3d Cir. 2006) (recognizing that a DEA laboratory report appeared to be a testimonial statement since it was offered to prove the weight and substance of ecstasy pills, but declining to decide the issue); *Belvin v. State*, 922 So. 2d 1046, 1054 (Fla. Dist. Ct. App. 2006) (breath test affidavit attesting to technician's procedures and observations was testimonial and inadmissible under *Crawford*); *Johnson v. State*, 929 So. 2d 4, 6 (Fla. Dist. Ct. App. 2005) ("lab report prepared pursuant to police investigation and admitted to establish an element of a crime is testimonial hearsay even if it is admitted as a business record"); *Shiver v. State*, 900 So. 2d 615, 618 (Fla. Dist. Ct. App. 2005) (affidavit prepared prosecutorially in preparation for trial attesting to proper maintenance on breath test machine was testimonial); *People v. Lonsby*, 707 N.W.2d 610, 620-21 (Mich. Ct. App. 2005) (information from lab report intimating that substance on defendant's shorts was semen was testimonial and inadmissible under *Crawford*); *City of Las Vegas v. Walsh*, 124 P.3d 203, 207-08 (Nev. 2005) (affidavit attesting that proper method of blood testing was followed was testimonial as it was prepared

for litigation); *State v. Berezansky*, 899 A.2d 306 (N.J. Super. Ct. App. Div. 2006) (laboratory certificate indicating sample of defendant's blood contained a blood-alcohol level of .33% was a testimonial statement because the report was not a record prepared or maintained in the ordinary course of government business, but was prepared in order to prove an element of the crime and offered in lieu of producing the qualified individual who actually performed the test); *People v. Rogers*, 8 A.D.3d 888, 891 (N.Y. App. Div. 2004) (report verifying presence of alcohol in victim's blood was prepared for prosecution and thus testimonial); *State v. Smith*, 2006 Ohio 1661, ¶¶ 5, 18 (Ohio Ct. App. 2006) (a laboratory report of a chemical analysis performed on substance determined to be crack cocaine was a testimonial statement, but defendant waived his confrontation rights by failing to demand the testimony of the laboratory technicians under state statute); *Commonwealth v. Carter*, 861 A.2d 957, 969-70 (Pa. Super. Ct. 2004) (without benefit of *Crawford*, court held that a lab report verifying the presence of cocaine in items seized from defendant was prepared in preparation for litigation and therefore lacked indicia of reliability traditionally found in business records). *But see Pruitt v. Alabama*, CR-04-2495, 2006 Ala. Crim. App. LEXIS 121, *13 (Ala. Crim. App. June 30, 2006) (certificate of analysis nontestimonial in nature and admissible under business-record hearsay exception); *People v. Johnson*, 18 Cal. Rptr. 3d 230, 233 (Cal. Ct. App. 2004) (laboratory report of substance determined to be cocaine used at probation revocation hearing "does not 'bear testimony,' or function as the equivalent of in-court testimony"); *People v. Hinojos-Mendoza*, No. 03CA0645, 2005 Colo. App. LEXIS 1206, *10 (Colo. Ct. App. July 28, 2005) (laboratory report establishing quantity and nature of cocaine was not testimonial due in part because the report was not prepared at the express direction of the prosecutor for the purpose of litigation); *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005) (certificates of analysis showing weight of cocaine not considered testimonial statements, as public records they constituted a recognized exception to Confrontation Clause); *State v. Dedman*, 102 P.3d 628, 635-36 (N.M. 2004) (the unavailability of a nurse that drew blood from defendant did not render report documenting results as inadmissible because it was considered nontestimonial as the testing was generated by a Department of Health employee, not law enforcement, and the report was not investigative or prosecutorial); *State v. Forte*, 629 S.E.2d 137, 143 (N.C. 2006) (DNA results that were not prepared exclusively for trial were nontestimonial since "[t]hey do not fall into any of the categories that the Supreme Court defined as unquestionably testimonial"); *State v. Huu The Cao*, 626 S.E.2d 301, 305 (N.C. Ct. App. 2006) (holding "laboratory reports or notes of a laboratory technician

resolution of this case, we need not decide that question today because, even assuming the report is testimonial, no Sixth Amendment violation can exist where a defendant voluntarily does not avail himself of the opportunity to confront a witness. *City of Las Vegas v. Walsh*, 124 P.3d 203, 209 (Nev. 2005).

[¶12] Section 19-03.1-37(5), N.D.C.C., provides certain procedural safeguards to protect an accused's confrontational rights:

> Notwithstanding any statute or rule to the contrary, a defendant who has been found to be indigent by the court in the criminal proceeding at issue may subpoena the director or an employee of the state crime laboratory to testify at the preliminary hearing and trial of the issue at no cost to the defendant. If the director or an employee of the state crime laboratory is subpoenaed to testify by a defendant who is not indigent and the defendant does not call the witness to establish relevant evidence, the court shall order the defendant to pay costs to the witness as provided in section 31-01-16.

Under this statute, defendants may subpoena the report's author. The statute also authorizes an indigent defendant to subpoena the director or employee of the state crime laboratory to testify at the preliminary hearing and trial at no cost to the defendant, making that witness available for confrontation.

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prepared for use in a criminal prosecution are nontestimonial business records only when the testing is mechanical, as with the Breathalyzer test, and the information contained in the documents are objective facts not involving opinions or conclusions drawn by the analyst"); *In re J.R.L.G.*, No. 11-05-00002-CV, 2006 Tex. App. LEXIS 3344, *6 (Tex. App. April 27, 2006) (urinalysis lab report from screening done under drug screen compliance check was nontestimonial evidence).

[¶13] There is nothing in this record to suggest the forensic scientist was unavailable. The statute provided Pinks and Campbell with the opportunity to subpoena the forensic scientist. They did not avail themselves of that opportunity. There may have been strategic reasons for not doing so. As a matter of trial tactics, subpoenaing the scientist, unless there are very sound reasons for challenging the report's accuracy, could elevate the importance of the report to the fact-finder. It is the opportunity to confront that is constitutionally required. This right can be waived. *City of Las Vegas v. Walsh*, 124 P.3d 203, 208 (Nev. 2005) (recognizing Confrontation Clause objections may be waived by failure to comply with statutory procedures). Because neither Pinks nor Campbell attempted to subpoena the forensic scientist as provided by statute, they have waived their ability to complain of a constitutional violation.

III

[¶14] Because the statute provided the author of the report would be made available by subpoena and Pinks and Campbell failed to avail themselves of that opportunity to confront the witness, they have waived any potential Confrontation Clause violation. We affirm.

[¶15] Carol Ronning Kapsner
Mary Muehlen Maring
Daniel J. Crothers
Dale V. Sandstrom
Gerald W. VandeWalle, C.J.

APPENDIX B

State of North Dakota
County of Mclean

In District Court
South Central Judicial District

Criminal Nos. 05-K-41 & 05-K-29, 05-K-30

State of North Dakota,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	Jury Trial
	)	
Billie Joe Campbell and	)	
Thomas Pinks, III,	)	
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

Before the Honorable Thomas J. Schneider
-- District Judge --

Taken At:
McLean County Courthouse
Washburn, North Dakota
June 13, 2005

APPEARANCES

For The Plaintiff:	Mr. Ladd Erickson State's Attorney Box 1108 Washburn, North Dakota 58577
For The Defendant: (Campbell)	Mr. Kent Morrow Attorney at Law P.O. Box 2155 Bismarck, North Dakota 58502-2155
For The Defendant: (Pinks)	Mr. Michael Hoffman Attorney at Law P.O. Box 1056 Bismarck, North Dakota 58502-1056

Q. [Page 112, Line 10][Mr. Erickson:] Now, items one through three there, what did you do with those?

A. I took them down to the state crime lab in Bismarck to have them tested.

Q. Did you get a lab report back?

A. Yes, I did.

Q. Officer, I will hand you what has been marked as State's Exhibit Number 4. Can you identify this?

A. Yes, I can.

Q. What is that?

A. This would be the laboratory report from the state lab in Bismarck.

Q. And that is for this case?

A. Yes.

MR. ERICKSON: Your Honor, I would move to admit -- well, excuse me. [113]

Q. (Mr. Erickson continuing) Is this a certified copy?

A. Yes, this is from the state lab.

Q. Okay.

MR. ERICKSON: Your Honor, I would move to admit State's Exhibit Number 4.

MR. HOFFMAN: Judge, I am going to object on the fact that the contents of that report are testimonial under *Crawford versus Washington*. We have a right to confront any lab person who purports to give information in this case.

MR. MORROW: I will join in that objection.

THE COURT: Mr. Erickson?

MR. ERICKSON: Your Honor, *Crawford* does not deal with -- it dealt with a non-staturized or coded hearsay exception. It was a common law case, hearsay rule that was otherwise reliable.

In this particular case in North Dakota, we have a specific statutory provision that permits the admissibility of a certified copy of a drug lab report, so there is a staturized hearsay exception to it and therefore it is

admissible under North Dakota law and a case called *State versus Schneider*.

THE COURT: Mr. Hoffman?

MR. HOFFMAN: If I'm correct, *Crawford versus* [114] *Washington* dealt with the admissibility of the subject evidence. In that case -- and it was admitted under their evidence rules. Now, whether we're talking about evidence rules or statute, it's the same thing. If there is a violation of confrontation, then it doesn't matter if there is a rule or if there is a statute, we still have the 6th amendment right to the evidence, witnesses and evidence against us. The question is whether it is testimonial. It is obviously testimonial, and the lab technician is not here. Doesn't matter if there's a statute, we have a right to examine the witness.

THE COURT: Want to add anything else, Mr. Erickson?

MR. ERICKSON: I don't obviously agree, Your Honor. I've got a lot of *Crawford* cases. The testimonial nature of this is put into the century code, and that -- where I disagree with the interpretation of that case is this; there was no rule in *Crawford*, there was a murder case where there was an after-statement made by the wife who didn't testify because of spousal immunity at trial, and her statement was admitted through a third party and it was dealing with that area. It has nothing to do with these documented foundation exhibits and certifications. [115]

THE COURT: All right. Mr. Erickson, Mr. Morrow, Mr. Hoffman, why don't you step up for just a moment here.

(Bench conference had, but not reported)

THE COURT: Okay. Members of the jury, we're going to take a short recess. I need to meet with the attorneys briefly. So keep in mind the admonition instruction. You are not to discuss the case or let anybody discuss it with you and do not form or express an opinion until the case is concluded and submitted to you for your deliberation. We'll take a short recess now.

(Recess had)

(In Chambers discussion had)

THE COURT: We're on the record now concerning an objection to the admission of State's Exhibit Number 4. Mr. Hoffman, from what I understand, you are saying that the Exhibit 4 would not be admissible because it is testimonial and the U.S. Supreme Court stated that this type of testimony, you have the right to cross-examine the analyst, is that correct?

MR. HOFFMAN: *Crawford versus Washington* did not deal with the lab report, it dealt with the police interrogation of a spouse against the other spouse out [116] of court, and she did not testify at the trial claiming privilege. The lower courts allowed the statements into evidence against the defendant. U.S. Supreme Court held that it was clearly testimonial because it was police interrogation and because it was testimonial, there should have been a right to cross-examine in the trial court and since that didn't happen, there was a reversal. They did not talk about lab reports.

City of Las Vegas versus Walsh, I believe it is, was a DUI case in which there was an objection by the defense to the fact that the nurse's blood draw was allowed into evidence without cross-examination of the nurse. The Supreme Court of Nevada overturned it and said, yes, you have a right to cross examine the nurse. We have a similar statute in North Dakota that allows -- the statute specifically allows use or still does allow the nurse's information to come in without bringing the nurse to testify.

THE COURT: And the lab tests?

MR. HOFFMAN: Well, it doesn't -- well, yes, we have. That's right. And as far as -- there is a blood draw for DUI, a blood draw for that, and granted a statute that allows the prosecution to use these lab reports without bringing the lab people. It would be the same thing as allowing the nurse's information [117] without bringing the nurse. My point is that it doesn't matter whether a rule of

evidence would allow something or a statute would allow something, if under *Crawford versus Washington* it is testimonial and you cannot cross-examine it. A 6th amendment violation.

So any DUI rule allowing the blood test in without the nurse or in this case a lab without the analyst, is still in violation of confrontation. *Crawford versus Washington* changed things. I believe the DUI context, that issue is before the North Dakota Supreme Court. And I believe Mr. Tuntland argued that case, but I don't know who the prosecutor was. It is an issue before the North Dakota Supreme Court now, but for the purposes of this trial under *Crawford* analysis, that is testimonial and we should be able to confront and cross-examine that analyst.

THE COURT: Mr. Erickson?

MR. ERICKSON: Your Honor, here's the way I understand *Crawford*, and I believe that under that Las Vegas case this is admissible. Let me talk about that first. What happened in the Las Vegas case, which was the first state court case that came out of *Crawford* -- there is one in Indiana now that admitted and I have that case in my office. I don't know how much relevance all this is. What happens in that case is the state [118] statute in Nevada had listed a number of things that the nurse could attest to, and drawing blood. And one of the things not in the statute was using an alternative disinfectant swab, so the nurse writes on the document the alternative disinfectant was used for the draw and no statutory hearsay exception for that. That wasn't in part of their statute.

So what happened in *Walsh* is that the Supreme Court of Nevada said that was a violation of *Crawford*, because not recognized hearsay exception. Here's where I differ with Mr. Hoffman, my understanding of *Crawford* is this; a case called *Ohio versus Roberts*, prior to *Crawford*, and what that did is there was evidence like in *Crwaford* that was beyond any generally recognized general

exception and testimonial in nature being it was allowed there if the court was satisfied it was otherwise reliable.

Now, the statement in court was a recorded statement to a spouse. That does not fall in hearsay exception. Once she claims spousal immunity or spouse claims that, and admitted over that objection, it didn't fit in anywhere, so I believe the burden is two-fold here. One, if it is testimonial, these documented, then the question for the court is does it fall within a generally recognized or modified hearsay exception? [119] That's the test of the *Crawford* case is.

In this case, as in *Walsh* and the other ones, the documents do have a legal basis for admissibility. Hearsay exceptions were not overruled. But one reason they're in the code, and this is one of them, there's no violation of *Crawford* when it comes to drug lab reports. It is a little different, by the way, in DUI cases, because a few things generalized on those may not be argued -- could be argued and don't get backed up by the Century Code. In this case I don't believe any *Crawford* order violations.

THE COURT: Mr. Morrow, anything else?

MR. MORROW: No.

THE COURT: We have had it all on the record, and the exhibit will be received. I don't think it is a violation, so the exhibit will be received. Anything else?

MR. HOFFMAN: No.

MR. MORROW: No.

THE COURT: Mr. Erickson?

MR. ERICKSON: No.

THE COURT: We'll go back in then and then we'll start up again.

(In-chambers discussion concluded)

THE COURT: We're back on the record now. [120] Mr. Erickson?

MR. ERICKSON: Your Honor, I move to admit State's Exhibit Number 4, subject to previous objections.

THE COURT: Okay. Four is received.

Q. (Mr. Erickson continuing) Deputy, would you tell the jury, based on Exhibits 1, 2, and 3, what the lab results were so they can understand what they're looking at?

A. Yes, I can. Item number one here would have been the baggie that was found in the rear seat of the patrol car. It shows item number one, a plant material residue and substance found in this item would have been Cannibis [sic], like meaning marijuana.

Item two, the one-hitter pipe. Again, smoking device that shows a substance found, resine [sic] of Cannibis [sic], being marijuana.

And the third item, the plant material residue that was found in the coat pocket, showed substance found Cannibis [sic], being marijuana.

Q. Thank you.

MR. ERICKSON: Can I have a moment, Your Honor?

THE COURT: Yes.

MR. ERICKSON: No further questions.

APPENDIX C

STATE'S EXHIBIT 4

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

Crime Laboratory Division
2635 E. Main Ave. – Box 937
Bismark, North Dakota 58502
Phone (701) 328-6159

RECEIVED
FEB 02 2005
McLean County
States Attorney

LABORATORY REPORT

Laboratory No.: C05-0114 Date Received: 24 Jan. 05
Received By: Troy Goetz Time Received: 1525 Hrs.
Delivered By: Jerry Kerzmann Date Reported: 25 Jan. 05
Agency Case No.: ----
Report To: McLean County Sheriff's Office
Washburn, ND 58577
Subject: Thomas Pinks
Billie Jo Campbell

Description of Evidence Submitted:

Item 1: One closed plastic zip lock evidence bag marked "baggy with possible marijuana residue, in back seat of patrol car, 1-15-04 approx. 0150, Billie Campbell, possession of a controlled substance, Deputy Jerry Kerzmann" containing one empty plastic bag and one cellophane wrapper containing plant material residue.

Item 2: One closed plastic zip lock evidence bag marked "one hitter pipe, in front of Chevy Blazer right under bumper, 1-15-04 approx. 0130, Thomas D Pinks, possession of drug paraphernalia, Deputy Jerry Kerzmann" containing one smoking device.

Item 3: One closed plastic zip lock evidence bag marked "possible marijuana seeds and residue, Billie Campbells person front left coat pocket, 1-15-05 approx. 0200, Billie Campbell, possession of

controlled substance, Correction officer Noelle Kroh" containing plant material residue.

Summary of Analysis:

Item	Submitted	Substance Found
1	plant material residue	Cannabis (Marijuana)
2	smoking device	Resin of Cannabis (Marijuana)
3	plant material residue	Cannabis (Marijuana)

Sincerely,

Crime Laboratory Division

[Signature]

Troy Goetz
Forensic Scientist