No. 09-10876

In The Supreme Court of the United States

DONALD BULLCOMING,

Petitioner,

v.

NEW MEXICO,

Respondent.

On Writ Of Certiorari To The New Mexico Supreme Court

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether a scientific test result generated by a machine is testimonial when it is recorded contemporaneously with the testing in a non-adversarial, unsworn public record.

2. Whether, if the public record is testimonial, the admission of transcribed raw data violates the Confrontation Clause when the defendant had an opportunity to confront a live witness about laboratory procedures and the functioning and accuracy of the machine, as well as an opportunity to retest the substance evaluated by the machine at the government's expense.

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STATEMENT OF THE CASE

Petitioner Donald Bullcoming rear-ended Dennis Jackson's truck while it was stopped at an intersection in Farmington, New Mexico, on August 14, 2005. JA 2-4, 29; Tr. 48-50. Mr. Jackson asked his wife, a passenger, to call the police when he saw that Petitioner had bloodshot eyes and smelled of alcohol. JA 3. Upon hearing the police had been called, Petitioner left the scene of the crime. *Id*. The responding officer located Petitioner a short time later and observed that he had watery, bloodshot eyes and slurred speech and he smelled of alcohol. *Id*.; Tr. 86, 91. Petitioner stated to another officer that he had not had a drink since early in the morning. JA 3. After Petitioner failed standard field sobriety tests, the officer arrested him for driving while intoxicated (DWI). *Id*.; Tr. 102-08.

When Petitioner refused to take a breath test, the arresting officer obtained a search warrant pursuant to New Mexico's Implied Consent Act and took him to the local hospital. JA 3-4; Tr. 109. A nurse extracted a sample of Petitioner's blood. JA 62; Tr. 69-70.

The arresting officer and the nurse filled out information on a Report of Blood Alcohol Analysis. JA 62. The report showed it was received by the New Mexico Department of Health's laboratory on August 16, 2005, that the sample seal was received intact, and that the seal was broken in the laboratory by the testing analyst on August 17, 2005. *Id*. Based on results generated by a machine, the analyst certified

that the sample showed a concentration of alcohol of .21 grams per 100 milliliters of blood. *Id*.

The following day, a reviewer certified on the report that the analyst met the necessary qualifications and followed established procedures for conducting the analysis. *Id*. A laboratory employee certified that a copy of the report was mailed to Petitioner on August 22, 2005. *Id*.

At trial, both the nurse and the arresting officer testified. Tr. 65, 97. The report was admitted into evidence through the testimony of Gerasimos Razatos, an analyst with the Department of Health. JA 48-60. Mr. Razatos reviewed the report but did not participate in performing the test or preparing the report. JA 49, 58. The analyst who performed the test had recently been placed on unpaid leave for unexplained reasons. JA 58. Petitioner objected to the section of the report prepared by the testing analyst, claiming it violated his right of confrontation because the testing analyst did not appear at trial and the report was prepared in anticipation of litigation. JA 44-46. The trial court admitted the report as a business record and held admission of the report was not prohibited by *Crawford v. Washington*, 541 U.S. 36 (2004). JA 45-46.

Mr. Razatos testified about the standard procedures of the laboratory. JA 49-59. He stated that the instrument used to analyze the blood was a gas chromatograph, a machine that detects compounds in the blood. JA 54. He also testified that the gas

chromatograph prints out the result and then the result is transcribed on the report. JA 54, 56. He confirmed that "there's nothing that the human has to do, other than look at the machine and record the results" and "any human being could look and write and just record the result." *Id.* Although Petitioner had a full opportunity to cross-examine Mr. Razatos, he asked no questions about the machine (JA 58-59), so despite Petitioner's discussion of gas chromatography (Br. 4, 35 n.4; *see* Amici NACDL Br. 5-22), no contrary information about the machine appears in the state court record.

During closing argument, defense counsel argued that the jury should question the accuracy of the blood analysis because the testing analyst was not present and had been placed on unpaid leave for unknown reasons. JA 60-61. At the end of the trial, the jury returned a verdict of guilty of DWI. R. 79.

Following affirmance by the intermediate state appellate court, the New Mexico Supreme Court held on discretionary review that the report was testimonial as defined by *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). JA 5-11. The court rejected the State's claim that an oath is required before a report may be considered sufficiently formal to qualify as the functional equivalent of live testimony. JA 11-12. The court nonetheless determined that the report could be admitted through the live testimony of a qualified analyst because the testing analyst merely transcribed results from a machine and, for

Confrontation Clause purposes, the machine was the true accuser. JA 13-16.

SUMMARY OF THE ARGUMENT

In evaluating whether there is a Sixth Amendment right to confront the declarant of an out-of-court statement at trial, the threshold question under *Crawford* is whether the statement is testimonial. Petitioner largely avoids this procedural question and instead addresses the substantive matter of the utility of cross-examination for the out-of-court statement at issue in this case. Because the definition of testimonial does not depend on substantive reliability, Petitioner's arguments do not assist in answering the threshold question.

This Court in *Crawford* set out three possible definitions of testimonial and later applied one of those definitions in *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813, 822 (2006): A statement to a police officer is testimonial when the objective primary purpose is to establish a past fact relevant to a possible future prosecution. However, in addressing the application of the Confrontation Clause to laboratory reports in *Melendez-Diaz*, the Court's narrow holding rests on the definition of testimonial that includes formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions. 129 S. Ct. at 2532. Although the Court also addressed the report under the *Hammon* primary purpose definition, *id.*, this discussion is not

part of the Court's holding. *See id.* at 2543 (Thomas, J., concurring).

For scientific evidence, the question under this Court's precedent is whether the statements are contained in formalized testimonial materials. The scientific evidence in this case is contained in a report that does not qualify as formalized testimonial material because it was not prepared under oath and is neither an affidavit nor a confession. Moreover, the inculpatory information in the report is a transcription of raw data produced by a machine. Machines are not witnesses within the meaning of the Sixth Amendment.

The Confrontation Clause should not be expanded beyond the Court's existing precedent to include non-adversarial public records. The purpose of the Confrontation Clause is to protect the adversarial right of confrontation and to prevent the substitution of inquisitorial practices for the adversarial trial process. Non-adversarial public records, like the report here prepared by an agency independent of law enforcement, do not offend the adversarial purposes of the Confrontation Clause. Further, the *Hammon* primary purpose test should not be extended to this case because there was no police interrogation or opportunity for prosecutorial influence.

The report is decidedly nontestimonial. However, the state court concluded otherwise based on the *Hammon* primary purpose definition. This definition has caused widespread confusion in the lower courts.

It is flawed, unworkable, and overly broad in relation to the adversarial purpose of the Confrontation Clause. For these reasons, Respondent respectfully seeks the overruling of *Hammon* and further proposes an alternative definition of testimonial based on this Court's opinion in *United States v. Inadi*, 475 U.S. 387 (1986). Under the principles set out in *Inadi*, a statement is testimonial only if it is a substitute for live testimony in that the context in which it was made provides no independent evidentiary significance in evaluating its content. This definition more closely adheres to the adversarial goals of the Confrontation Clause than the *Hammon* definition. Non-adversarial public records, like the one in this case, are not testimonial because they are not substitutes for live testimony.

Even if the public record in this case could be viewed as testimonial, the New Mexico Supreme Court properly ruled that the adversarial protections provided to Petitioner satisfied the right of confrontation. Petitioner had an opportunity to confront the raw data through retesting, and he had an opportunity to cross-examine a witness with personal knowledge of the laboratory's procedures and the functioning of the machine. This Court has said that the Confrontation Clause does not demand incidental benefits at the cost of preventing the fair administration of criminal justice. *Mattox v. United States*, 156 U.S. 237, 243 (1895). Petitioner is not entitled to an incidental benefit when he received substitute means of

confrontation equal or superior to cross-examination of the testing analyst.

Respondent does not ask this Court to overrule or modify *Crawford* or the holding of *Melendez-Diaz*. Recognizing the procedural course this Court charted in *Crawford*, Respondent asks the Court to stay true to *Crawford*'s procedural heading rather than follow *Hammon*'s purpose-based substantive detour. The Court has not previously held that the Confrontation Clause applies to unsworn public records prepared by scientists, and the procedural purpose of the Confrontation Clause does not support an expansion of the Court's holdings to the public record in this case.

ARGUMENT

I. THE REPORT IS NONTESTIMONIAL AND THUS NOT SUBJECT TO THE CONFRONTATION CLAUSE.

In *Crawford*, the Court recognized that an accused's right under the Confrontation Clause "to be confronted with the witnesses against him" could be read as establishing the right to confront "those who actually testify at trial," "those whose statements are offered at trial," or "something in-between." 541 U.S. at 42-43. The Court thus recognized the potential for two absolute views of the Clause. Under the first view, a defendant would not have a constitutional right to confront hearsay declarants who do not appear at trial; under the second view, a defendant

would have the right to in-trial confrontation of all hearsay declarants. The Court rejected both absolute views and instead chose "something in-between" – an interpretation of the Clause that provides not only the right to in-trial confrontation of in-trial witnesses but also the right to confront hearsay declarants who reasonably can be considered witnesses against the accused because they have given testimony. *Id*. at 51, 67. "'Testimony,' in turn, is typically a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id*. at 51. Thus, whether the Confrontation Clause applies to a particular statement depends on whether the declarant of the statement was a witness bearing testimony or, as described in *Crawford*, whether the statement is testimonial. *Id*. at 51-52; *see White v. Illinois*, 502 U.S. 346, 358 (1992) ("[T]he admissibility of hearsay statements raises concerns lying at the periphery of those that the Confrontation Clause is designed to address.").

The Court in *Crawford* also rejected the view of *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), that the right of confrontation is a substantive guarantee defined by the reliability of evidence and the utility of cross-examination. In *Crawford*, the Court adopted a procedural interpretation of the right and explained that "[t]he *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability." *Id*. at 62. "Dispensing with confrontation because testimony is

obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Id.*

Thus, under *Crawford*, neither reliability nor the utility of cross-examination determines the application of the Confrontation Clause to hearsay. That a defendant can postulate ways in which cross-examination may be useful in exposing the unreliability of a hearsay statement has no more bearing on the inquiry under *Crawford* than the ineffectiveness of cross-examination based on a statement's inherent reliability.

Petitioner argues that the fatal flaw with the report is that it was presented through a surrogate witness who could not be effectively cross-examined regarding the information prepared by the testing analyst. In so doing, Petitioner focuses on the utility of cross-examination, a question of substantive reliability that does not assist in answering the threshold question whether the report in this case is testimonial.

Petitioner's emphasis on the utility of cross-examination fails to account for the fact that the Confrontation Clause applies only to testimonial hearsay statements, not to all hearsay. *See Whorton v. Bockting*, 549 U.S. 406, 419-20 (2007). Each of the benefits of cross-examination discussed by Petitioner applies equally to testimonial and nontestimonial statements. In Petitioner's example of the man who observes an altercation between two neighbors, Br. 21, the man's statements to police the next day would meet the current definition of testimonial, *see*

Hammon, 547 U.S. at 822, but if he made the same statements to his wife, those statements would not be testimonial. *See Crawford*, 541 U.S. at 51. Yet, the defendant would benefit from an opportunity to cross-examine the man about his statements to his wife in exactly the same way he would benefit from the opportunity to cross-examine him about his statements to the police. Indeed, Petitioner's argument is that the wife should not be allowed to testify about her husband's statements because the defendant would lose the benefits of cross-examining the husband on matters only he can answer. The threshold confrontation question in this example is not whether and how cross-examination might benefit a defendant; it is instead whether the statement is testimonial.

A. Scientific evidence is testimonial only if it is contained in formalized testimonial materials; the unsworn report in this case is distinguishable from the affidavit in *Melendez-Diaz*.

1. In *Crawford*, the Court listed three possible definitions of testimonial: one based on a declarant's subjective expectation about the statement's use in a criminal prosecution, one that includes only formalized testimonial materials, and one based on an objective view of the statement's possible use at a future trial. *Id.* at 51-52. All of these definitions attempt to capture a core class of testimonial statements that includes live testimony and its functional equivalent. However, the Court declined to adopt any

one definition because custodial interrogations qualify as testimony "even under a narrow standard." *Id.* at 52.

Following *Crawford*, the Court has continued to refer to these three proposed definitions. In *Davis*, the declarant made statements identifying the defendant as her assailant during a 911 call reporting domestic violence and seeking assistance. 547 U.S. at 818. In *Hammon*, the declarant made statements to police after they arrived at the scene and questioned her. *Id*. at 819-20. Because both cases involved non-custodial police questioning, the Court needed to clarify the proper definition of testimonial. With some refinement, the Court adopted the third definition proposed in *Crawford*: statements made during a police interrogation for the objective "primary purpose" of establishing or proving "past events potentially relevant to later criminal prosecution." *Id.* at 822. Applying this definition, the Court concluded that the statements in *Davis* were not testimonial because they were made during an ongoing emergency but the statements in *Hammon* were testimonial because they were made after the alleged violence had occurred and for the primary purpose of establishing past criminal conduct. *Id*. at 828-29.

In *Melendez-Diaz*, the Court addressed the admission of statements provided to police in sworn certificates of analysis identifying substances seized from the defendant as cocaine. 129 S. Ct. at 2530-31. A majority of the Court found the statements testimonial because they were made in affidavits. *Id*. at

2532. Citing *Crawford*, the majority explained that affidavits, like sworn testimony in a preliminary hearing or a grand jury proceeding, "are incontrovertibly a '"solemn declaration or affirmation made for the purpose of establishing or proving some fact."'" *Id*. (quoting *Crawford,* 541 U.S. at 51, which quoted N. Webster, An American Dictionary of the English Language (1828)). In other words, the certificates were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Id.* (quoting *Davis,* 547 U.S. at 830).

Beyond this narrow holding, the Court's opinion in *Melendez-Diaz* also indicated that the statements contained in the certificates were testimonial because they were prepared under a Massachusetts statute making their "*sole purpose* . . . to provide 'prima facie evidence of the composition, quality and the net weight' of the analyzed substance." *Id*. Justice Thomas agreed with the majority's view that the statements were testimonial because they were made under oath but did not indicate agreement with the view that the statements were testimonial based on their purpose. *Id.* at 2543 (Thomas, J., concurring). Justice Thomas reasserted his position that the Confrontation Clause applies only to statements in formalized testimonial materials and cited his earlier opinions that criticized a purpose-based approach. *Id.*; *see Hammon*, 547 U.S. at 834-42 (Thomas, J., concurring in the judgment in part and dissenting in part); *White*, 502 U.S. at 364 (Thomas, J., concurring in part and concurring in the judgment).

In addition to Justice Thomas's lack of agreement on a *Hammon* rationale, four other Justices indicated in *Melendez-Diaz* that the primary purpose definition should not apply to scientific evidence. *See* 129 S. Ct. at 2552 (Kennedy, J., dissenting). Therefore, a majority of the Court did not apply the objective primary purpose definition of testimonial from *Hammon* to scientific evidence. Instead, the Court's limited holding in *Melendez-Diaz* is based on the second definition of testimonial proposed in *Crawford*: statements in "'formalized testimonial materials'" comprised of "'affidavits, depositions, prior testimony, and confessions.'" 541 U.S. at 52 (quoting *White*, 502 U.S. at 365 (Thomas, J., joined by Scalia, J., concurring in part and concurring in the judgment)). Scientific evidence is currently evaluated under a different definition of testimonial than statements to police officers by eyewitnesses at the scene of a suspected crime.

2. Unlike the affidavit in *Melendez-Diaz*, the document in the present case is not sworn. JA 62. Although the absence of an oath is not by itself dispositive of formality, *see Crawford*, 541 U.S. at 52, the report is not an affidavit, a deposition, or prior testimony. Moreover, unlike Lord Cobham's examination admitted in Sir Walter Raleigh's trial, *id.*, the report is not an unsworn confession. The report is instead a public record, and it bears no more formality than any other unsworn public record.

The report is further distinguishable from the affidavit in *Melendez-Diaz* in other important ways. In *Melendez-Diaz*, the analyst prepared the affidavit

nearly one week after the completion of testing. 129 S. Ct. at 2552. The sole purpose of the affidavit was to establish an element of a crime in a criminal prosecution, *id.* at 2532, so presumably an officer would not have requested and an analyst would not have prepared such an affidavit unless it were inculpatory. *See* Mass. Gen. Laws ch. 111, § 13 (West 2006) (requiring an analyst to prepare an affidavit "upon request" of an officer).

The report in this case does not have these qualities. Analysts with the Department of Health enter the result of the blood analysis on the report at the time of testing. JA 64. The analyst in this case, unlike the one in *Melendez-Diaz*, contemporaneously described a machine's statement about "the *present condition* of the blood." *United States v. Washington*, 498 F.3d 225, 232 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009); *accord People v. Geier*, 161 P.3d 104, 139 (Cal. 2007) ("contemporaneous recordation of observable events"), *cert. denied*, 129 S. Ct. 2856 (2009). "An observation recorded at the time it is made is unlike the usual act of testifying." *Melendez-Diaz*, 129 S. Ct. at 2551 (Kennedy, J., dissenting).

In addition, the analyst completes the report regardless of whether the result favors the State or the donor. The Department of Health provides its results in a non-adversarial manner by sending them to both parties and retaining a sample of the blood for retesting. The results may benefit either party in that they may be inculpatory or exculpatory. *See* N.M. Stat. Ann. § 66-8-110(B) (2010). Moreover, an

arrestee may request blood testing by an analyst of his or her choosing at the State's expense. N.M. Stat. Ann. § 66-8-109(B), (E) (2010).

The analyst follows a routine manner of preparation and analyzes the blood pursuant to a duty imposed on the public agency by law. *See Evanston v. Gunn*, 99 U.S. 660, 666 (1879) (upholding the admission of a public record containing meteorological observations because the record "had been kept by a person whose public duty it was to record truly the facts stated in it"). The report is thus like other non-adversarial public records containing observations made under a legal duty, such as birth certificates or judgments of conviction. Neither the contemporaneous recording of the result nor the public duty to make the observation can be replaced by live testimony or recreated in a courtroom. In other words, an analyst does not become a witness by performing scientific tests in a laboratory; an analyst only becomes a witness by testifying.

These qualities sharply distinguish the report in this case from the sworn certificate of analysis in *Melendez-Diaz*. There, the Court did not review a non-adversarial scientific report prepared in a laboratory during scientific testing. The Court instead addressed an affidavit prepared by an analyst at a later date upon an officer's request. Like former testimony or depositions, there were no circumstances surrounding the preparation of the affidavit that would have provided probative information to a fact-finder beyond the content of the document. In effect,

Massachusetts deliberately turned the non-adversarial laboratory into an adversarial courtroom and the analyst from a scientist making a contemporaneous observation into a witness against the accused establishing a past fact. This change in the analyst's role, rather than the laboratory testing itself, triggered the procedural protections of the Confrontation Clause.

Thus, the Court's opinion in *Melendez-Diaz* does not support Petitioner's attempt to transform the holding into a categorical rule that "forensic reports are testimonial." Br. 11. The Court did not broadly decide, as characterized by Petitioner, that "forensic reports are 'testimonial statements' inasmuch as analysts who create such reports are 'witnesses' for purposes of the Sixth Amendment." Br. 9. The Court instead decided that affidavits are formalized testimonial material whether prepared by a scientist or any other witness. The report in this case is not an affidavit or other formalized testimonial material. It is therefore nontestimonial.

3. The particular type of scientific evidence at issue – raw data – also sets this case apart from the Court's *Crawford* precedent. In *Melendez-Diaz*, the trial record did not reveal the extent of interpretation and judgment involved in the analyst's identification of the controlled substance. 129 S. Ct. at 2537. There is no such ambiguity in this case; the trial record establishes without dispute that the analyst copied a number from a machine printout to the

report without interpretation or any independent assessment. JA 54, 56.

The text of the Sixth Amendment applies to "witnesses." The Court's decisions in *Crawford*, *Davis,* and *Melendez-Diaz* address how to determine whether an out-of-court statement of a witness, that is, a person, is testimonial. For blood alcohol test results, the statement at issue is the result generated by the gas chromatograph. But a machine, of course, cannot act as a witness, and a machine-generated test result is not a statement. Rather, the test result is raw data indicating the alcohol content of the blood sample analyzed by the machine.

In this case, the machine generated the raw data in the form of a printout. JA 56. Like the blood itself, or other real evidence such as a photograph, the machine printout is not testimonial evidence. *Cf. Schmerber v. California*, 384 U.S. 757, 764 (1966) (describing blood as "'real or physical evidence'" for purposes of the Fifth Amendment). Indeed, the New Mexico Supreme Court recognized that the "raw data produced by the gas chromatograph machine . . . is not subject to the constraints of the Confrontation Clause." JA 17. Petitioner does not appear to disagree with the state court's conclusion on this point. *See* Br. 33.

Petitioner complains, however, that he was denied the right to confrontation because the analyst who transcribed the raw data onto the report did not

testify. Br. 33-36.[1] Although the printout itself apparently would have been admissible, Petitioner argues that the mere act of recording raw data onto a public or business record is sufficient to trigger the confrontation right. Respondent disagrees. Just as the "narrowly circumscribed" act of authenticating a copy of an existing public record does not involve "interpretation of what the record contains or shows," *see Melendez-Diaz*, 129 S. Ct. at 2539, the simple act of copying raw data onto a public record does not involve interpretation of what the raw data shows. *See People v. Brown*, 918 N.E.2d 927, 931 (N.Y. 2009) ("[T]he technicians' use of the typing machine would not have entailed any such subjective analysis."); *cf. Mattox*, 156 U.S. at 244 (observing that "all the authorities hold that a copy of the stenographic report of [the witness's] entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness, . . . is competent evidence of what he said"). The mere act of copying raw data onto a public or business record cannot be viewed as a statement or declaration separate or distinct from the raw data itself, any

[1] Petitioner also argues that the analyst made statements aside from the transcription, including a statement about following laboratory procedures in obtaining the machine result. Br. 36. Beyond the fact that this statement is not contained in formalized testimonial materials, Petitioner did not separately object to this statement or request a redaction in the trial court (JA 44-47), and in fact, a reviewer made the same statement about procedures having been followed (JA 62) without Petitioner demanding the reviewer's appearance at trial.

more than the act of authenticating a copy is distinct from the copy itself. Therefore, the Confrontation Clause applies to neither raw data nor a mere transcription of raw data onto a public or business record.

In *Heike v. United States*, 227 U.S. 131, 144-45 (1913), the Court addressed a Confrontation Clause claim directed at transcribed raw data. In a conspiracy and revenue fraud case involving the importation of sugar, the prosecution proved fraud by comparing company records of sugar weights, referred to as "pink books," with government records of weights, referred to as "dock books." *Heike v. United States*, 192 F. 83, 94-97 (2d Cir. 1911). On certiorari, the defendants argued that the admission of the company's pink books violated the hearsay rule and the Confrontation Clause because not all of the weighers or transcribers testified at trial. *See* 227 U.S. at 136, 144; 192 F. at 96-97. The Court summarily rejected the defendants' Confrontation Clause claims, finding no violation of the Clause by the admission of the pink books in the absence of testimony by the weighers. 227 U.S. at 144-45.

In *Heike*, the weighers did no more than note the weight shown on the scales so it could be entered into the pink books. 192 F. at 96-97. Similarly, in this case, the analyst's role in noting the test result on the report was simply to transcribe the blood-alcohol content measured by the machine. The only difference is that the analyst used a gas chromatograph to measure the alcohol in Petitioner's blood, while the weighers in *Heike* used a scale to measure the weight

of sugar the defendants had imported. In both cases, the evidence at issue was raw data that was not subject to the Confrontation Clause.

Raw data is generated in many different ways, including machine-generated chemical analysis, statistical analysis by computer program, analysis of breath-alcohol content by a breath alcohol machine, and detection of a vehicle's speed by radar.[2] As the Seventh Circuit explained, if the raw results of a scientific analysis "are 'statements' by a 'witness against' the defendants, then the machine must be the declarant. Yet how could one cross-examine a gas chromatograph? Producing spectrographs, ovens, and centrifuges in court would serve no one's interests." *Moon*, 512 F.3d at 362.

Of course, such measures are not necessary to confront raw data. In contrast to statements made by a witness, which can be challenged primarily through cross-examination, raw data can be challenged by retesting the physical evidence. Petitioner's blood sample was available for retesting upon request. JA 52; *see also* N.M. Stat. Ann. § 66-8-109(B). If Petitioner had a concern about transposition of numbers,

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[2] *See, e.g., United States v. Moon*, 512 F.3d 359, 361-62 (7th Cir.), *cert. denied*, 129 S. Ct. 39, *and cert. denied*, 129 S. Ct. 40 (2008); *United States v. Lamons*, 532 F.3d 1251, 1262-65 (11th Cir.), *cert. denied*, 129 S. Ct. 524 (2008); *Smith v. State*, 28 So. 3d 838, 853-55 (Fla. 2009) (per curiam), *petition for cert. filed*, No. 09-10755 (May 10, 2010); *State v. Weber*, 19 P.3d 378, 381 (Or. Ct. App. 2001).

the accuracy of the machine, or compliance with laboratory protocols, he had more effective means of testing the raw data than demanding a machine's presence in court or cross-examining a transcriptionist[3] that in all reasonable likelihood would not have had any independent recollection of the particular transcription in this case. The very fact that raw data is susceptible to challenge through retesting, but not cross-examination (because one cannot cross-examine a machine), demonstrates that raw data is not a testimonial statement to which the confrontation right applies. *Cf. United States v. Ash*, 413 U.S. 300, 318 n.10 (1973) (noting that duplication is not typically a quality of an adversarial proceeding).

B. The definition of testimonial should not be expanded to include non-adversarial, unsworn public records containing scientific observations.

As shown above, applying the formalized testimonial materials definition of testimony from *Melendez-Diaz* to the scientific report in this case is a

[3] Respondent recognizes that the analyst had a larger role in the *testing* than merely making a transcription (*see* JA 53-54, 64-65), but the Confrontation Clause challenge in this case concerns the preparation of and statements in a report, not the process of scientific testing. The New Mexico Supreme Court correctly described the analyst's role in writing the number on the report as that of a scrivener. JA 2.

relatively straightforward matter. To the extent there is any question about the nontestimonial quality of the report, it is largely a product of *Melendez-Diaz* discussing both the substantive reliability of scientific evidence and the primary purpose definition of testimonial from *Hammon*. With respect to the former, the Court expressly reaffirmed the determination in *Crawford* that the application of the Confrontation Clause does not depend on a statement's reliability and noted that the discussion of reliability was simply in response to the dissent. *Melendez-Diaz*, 129 S. Ct. at 2537 n.6. With respect to the discussion of the purposes of the document, it does not appear to reflect the views of a majority of Justices and, in any case, is not part of the holding explicitly set out in the Court's opinion: "The analysts who swore the affidavits provided testimony against Melendez-Diaz, and they are therefore subject to confrontation. . . ." *Id.* Nonetheless, the *Hammon*-derived dicta has fostered confusion.

Applying *Melendez-Diaz*, the New Mexico Supreme Court recognized that the "narrowest grounds for the holding are found in Justice Thomas's concurrence." JA 11. However, the court determined the report was testimonial and the lack of an oath in preparing the report was not dispositive because the certificates were produced for "'the purpose of establishing or proving some fact.'" JA 12 (quoting *Melendez-Diaz*, 129 S. Ct. at 2532). Other lower court decisions applying *Melendez-Diaz* reflect this same confusion about whether the *Hammon* primary

purpose definition of testimonial applies to scientific evidence. *Compare, e.g., State v. Dilboy*, 999 A.2d 1092, 1105 (N.H. 2010) ("Justice Thomas's concurring opinion . . . underscores the limited reach of *Melendez-Diaz*."), *petition for cert. filed*, No. 10-6278 (Aug. 31, 2010), *with Marshall v. State*, 232 P.3d 467, 475 (Okla. Crim. App. 2010) (concluding a report was testimonial because it "was prepared for use in a criminal trial").

Two aspects of the dicta in *Melendez-Diaz* are particularly noteworthy: (1) the rejection of a public records rationale, 129 S. Ct. at 2538, and (2) the description of the affidavit as the product of police interrogation, 129 S. Ct. at 2535. Viewing these two considerations in the context of the purpose of the Confrontation Clause, they do not support an extension of *Hammon* to this case. Public records are not inquisitorial when they contain routine scientific observations by public officials who are independent of law enforcement, even if they are made at the arm's length request of a police officer. These non-inquisitorial documents do not threaten the Confrontation Clause's protection of the adversarial system of criminal justice.

1. The Confrontation Clause protects against the common-law abuse of admitting at trial statements made to magistrates during pre-trial *ex parte* examinations.

In *Crawford*, noting that the Confrontation Clause's text alone does not reveal its scope, the Court turned "to the historical background of the Clause." 541 U.S. at 42-43. That historical background reveals a specific abuse targeted by the Framers as requiring redress to ensure the adversarial process in criminal prosecutions: the use at trial of a pre-trial *ex parte* judicial examination of a witness in lieu of the witness's appearance at trial. *Id*. at 43. This abusive practice traces back to the Marian bail and committal statutes. *Id*.

The bail statute of 1554 required the magistrate to "take the examination" of the accused and his accusers regarding the circumstances of arrest and the facts "material to prove the felony" and to reduce the examination to writing and certify the examination to supervising judges. John H. Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* 11 (1974) [*Prosecuting Crime*]. The committal statute, enacted the following year, adopted a similar procedure for magistrates committing an accused to jail pending the trial. *Id*. at 16.

These statutes did not require the examining magistrate to elicit exculpatory information from the accused or the witnesses. *Id*. at 18. As a result, the

magistrate examinations were inquisitorial in nature. Indeed, the magistrate's "job was to help the accuser build the prosecution case, rather than to serve as a neutral investigator seeking all the evidence, inculpating and exculpating." John H. Langbein, *The Origins of the Adversary Criminal Trial* 43 (2005) [*Origins*].

In *Crawford*, the Court determined the Confrontation Clause required exclusion of statements made by Sylvia Crawford to police who suspected her participation in the assault and attempted murder they were investigating. In so doing, the Court concluded that "[p]olice interrogations bear a striking resemblance" to the magistrate examinations under the Marian bail and committal statutes. *Crawford*, 541 U.S. at 52. This resemblance stems from the inquisitorial nature of custodial interrogations.

As an element of pre-trial investigation, such an inquisitorial procedure has its place, even within our adversarial criminal justice system. *See McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991). The abuse of the inquisitorial procedures of the Marian statutes occurred when the magistrate examinations were substituted for the adversarial process of the witness's appearance to testify at trial. *See Crawford*, 541 U.S. at 43-44, 50. Thus, the confrontation right is implicated only when the inquisitorial investigation substitutes for the adversarial examination of witnesses at trial.

This view is consistent with the role played by the Marian examination procedures in the development of the adversarial system of criminal prosecution. As the Court noted, the magistrate examinations probably were not intended to have evidentiary force at trial. *Id.* at 44 (citing *Prosecuting Crime*, *supra,* at 21-34). Nevertheless, statements made during these examinations "came to be used as evidence in some cases." *Id*. Yet, the examination procedures were decidedly favorable to the prosecution and unfavorable to the accused. For example, whereas the examining magistrate bound over the victim and material witnesses to appear at trial, the accused was not provided with a mechanism to compel witnesses on his behalf or learn the charges against him. *Origins*, *supra,* at 48-51. As a result, the Marian examination procedures had the effect of pressuring the accused to speak on his own behalf at trial. That effect, combined with the absence of the right to counsel, meant that the accused was forced "to respond in person to the charges and the evidence against him." *Id*. at 48. The move to an adversarial system addressed many of these effects of the Marian examination procedures "to even up for advantages of the prosecution." *Id*. at 333.

The Framers assured that the procedural aspects of the adversary system would remain inviolate by placing them in the Fifth and Sixth Amendments. The privilege against self-incrimination in the Fifth Amendment "was designed primarily to prevent 'a recurrence of the Inquisition and the Star Chamber.' "

Pennsylvania v. Muniz, 496 U.S. 582, 596 (1990) (quoting *Ullmann v. United States*, 350 U.S. 422, 428 (1956)). Similarly, the Sixth Amendment rights to counsel, notice, compulsory process, and confrontation "guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice." *Faretta v. California*, 422 U.S. 806, 818 (1975). These rights, as well as other protections such as proof beyond a reasonable doubt, "are all characteristics of the accusatorial system and manifestations of its demands." *Watts v. Indiana*, 338 U.S. 49, 54 (1949).

2. Public records prepared by public officials who are not members of law enforcement are non-adversarial and thus do not implicate the purposes of the Confrontation Clause.

As these historical underpinnings of confrontation illustrate, the purpose of the Confrontation Clause with respect to out-of-court statements is to prevent an inquisition substituting for an adversarial trial. Not all out-of-court statements, however, implicate this purpose. In *Melendez-Diaz*, the Court observed that business records prepared in anticipation of litigation do not satisfy the hearsay exception for regularly kept records. 129 S. Ct. at 2538. However, this limitation on the hearsay exception is not based on adversarial concerns; it is strictly a matter of reliability based on the self-serving nature of the record and an associated motive to lie. *See Palmer v.*

Hoffman, 318 U.S. 109, 113-14 (1943). A motive to lie in a private business record, such as the report of a private detective for a client or the blood analysis of a private hospital for a patient, would not transform an otherwise nontestimonial document into a testimonial one. *See Whorton*, 549 U.S. at 420. Purely private acts are not inquisitorial or adversarial for purposes of the Sixth Amendment.[4]

The adversarial focus of the Confrontation Clause, however, requires closer scrutiny of records prepared by the government. This Court has recognized that public records are "unusually trustworthy sources of evidence" because they are "required by law to be kept," their official contents are "entered under the sanction of public duty," there is an "obvious necessity for regular contemporaneous entries in them," and there is "a minimum of motive on the part

[4] For example, during Raleigh's trial, a witness named Dyer related a treasonous plot between Raleigh and Lord Cobham as described to Dyer by a gentleman in Portugal. *Raleigh's Case*, 2 How. St. Tr. 1, 25 (1603). This gentleman's primary purpose was certainly to establish past events, and viewed objectively, he had to know that the grave accusation (colloquially speaking) made to a man who favored the crowning of the king, *id.*, could have ramifications for apprehension or prosecution. However, unlike his objections to Lord Cobham's examination, Raleigh's objection to this private conversation was based on relevance, not confrontation. Richard H. Underwood, *Perjury: An Anthology*, 13 Ariz. J. Int'l & Comp. L. 307, 319-20 (1996). Raleigh's selective plea to confront inquisitorial statements is consistent with *Crawford*'s description of private conversations as nontestimonial, 541 U.S. at 51.

of public officials and employees to either make false entries or to omit proper ones." *Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 128-29 (1919). Given their preparation by the government, however, trustworthiness for public records is uniquely linked to their non-adversarial character. As the Court observed in *Melendez-Diaz*, the hearsay exception does not include adversarial public records. 129 S. Ct. at 2538; *see* Fed. R. Evid. 803(8)(B) (excluding matters observed by police officers in criminal cases); N.M. R. Ann. 11-803(H) (same).

"Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases *because of* the adversarial nature of the confrontation between the police and the defendant in criminal cases." S. Rep. No. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7064 (emphasis added). Thus, even though reliability and evidentiary rules are not determinative under *Crawford*, the hearsay exception for public records and *Crawford* share a common adversarial focus in a way that is not true of other hearsay exceptions. For this reason, even before *Crawford* overruled the reliability test of *Roberts*, courts assessed the adversarial nature of public records for purposes of hearsay in the same way that is now required for the Confrontation Clause.

The limitation on public records is primarily aimed at police reports, which are adversarial in nature. Police officers are involved in "the often

competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), and they also at times function as prosecutors, or as members of the prosecutorial team, *see Kyles v. Whitley*, 514 U.S. 419, 437 (1995). An officer's statements in a police report that establish or prove past facts have an accusatory quality by virtue of the officer's connection to the prosecutorial team. From an adversarial standpoint, proof of a fact at trial through an officer's observations in a police report would evoke the type of judicial or prosecutorial factfinding used in inquisitorial systems. *See Nix v. Williams*, 467 U.S. 431, 453 (1984) (Stevens, J., concurring in the judgment) ("The Sixth Amendment guarantees that the conviction of the accused will be the product of an adversarial process, rather than the *ex parte* investigation and determination by the prosecutor."); *see also Ash*, 413 U.S. at 308-09 (noting the early adoption of "the institution of the public prosecutor from the Continental inquisitorial system" and the Sixth Amendment's role in minimizing "the imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official"). The quasi-adversarial factfinding of a police officer thus implicates both the limitation on the hearsay exception and the purposes of the Confrontation Clause.

The same is not true of routine observations by police officers outside the adversarial enterprise of investigating a crime. *See, e.g., United States v. Enterline*, 894 F.2d 287, 290-91 (8th Cir. 1990)

("Neither the notation of the vehicle identification numbers themselves nor their entry into a computer presents an adversarial setting or an opportunity for subjective observations by law enforcement officers."); *United States v. Hernandez-Rojas*, 617 F.2d 533, 535 (9th Cir. 1980) ("The recordation of a routine matter such as the fact and date of Hernandez's deportation is plainly not of the adversarial nature that might 'cloud the perception' of the law enforcement official.") (quoting *United States v. Orozco*, 590 F.2d 789, 793 (9th Cir. 1979)).

Nor is there an inquisitorial danger associated with reports by public officials, like the scientist in this case, who operate independently of law enforcement and therefore lack both an adversarial interest and a prosecutorial role in criminal proceedings. For these public officials, it does not advance the adversarial protections of the Confrontation Clause to examine their purposes in making a public record.

At common law, for example, the prosecution could rely on a jail's daily log to establish the defendant's date of release for purposes of proving the violation of a condition of pardon, even in the absence of testimony by the turnkeys who observed the prisoner's release and reported the matter to the clerk at the jail. *King v. Aickles*, 1 Leach 390, 391, 168 Eng. Rep. 297, 298 (1785). From an objective point of view, a jailor or a clerk at a jail could reasonably anticipate a future prosecutorial use of dates of release, particularly for prisoners subject to further requirements upon their release. Nonetheless, the court in *Aickles*

properly viewed the clerk as having no private interest in the case sufficient to induce him to make "factitious entries" in the log. 1 Leach at 392, 168 Eng. Rep. at 298. "He is a public officer recording a public transaction." *Id.*; *accord White v. United States*, 164 U.S. 100, 104 (1896) (discussing *Aickles* and observing that entries made by a clerk at a jail under a duty to keep a list of the dates of discharge "would be evidence in and of themselves").

Similarly, in *Heike*, the United States weighers might have, objectively speaking, anticipated the future prosecutorial use of the measurements in their dock books, but the Second Circuit did not scrutinize the public officials' purposes in their routine, ministerial duties. The Second Circuit rejected the hearsay and Confrontation Clause arguments relating to the dock books on the ground that the weights were contained in public records "admissible from a time anterior to the adoption of the Constitution," 192 F. at 94-95, a ruling not challenged on certiorari in this Court, *see* 227 U.S. at 136.

For over fifty years, courts have also analyzed under the public records exception whether laboratory reports prepared by scientists outside the law enforcement team should be deemed adversarial. Beginning in *United States v. Ware*, 247 F.2d 698, 699-700 (7th Cir. 1957), these courts distinguished between documents prepared by law enforcement personnel having an adversarial and prosecutorial role in a criminal proceeding and records of independent scientists who make observations according

to a non-adversarial public duty. *E.g., United States v. Rosa*, 11 F.3d 315, 332 (2d Cir. 1993) ("[T]hough law enforcement activities are typically accusatory and adversarial in nature, a medical examiner's reported observations as to a body's condition are normally made as part of an independent effort to determine a cause of death."); *United States v. Bell*, 785 F.2d 640, 644 (8th Cir. 1986) ("The relationship between police officers and those whom they arrest is much more personal and adversarial in nature than that between chemists and those whose urine they test.").[5]

Consistent with this authority, New Mexico decisions, prior to being overruled in the present case based on *Hammon* (JA 11), determined that blood alcohol reports like the one in this case are non-adversarial. "[T]he state laboratory is part of the State Department of Health; it is not an arm of law enforcement and its employees are not law enforcement personnel." *State v. Christian*, 895 P.2d 676, 681 (N.M. Ct. App. 1995). These public officials "follow a routine manner of preparation, in a non-adversarial setting." *Id.* at 682. The New Mexico Supreme Court later reached the same conclusion under both the public records hearsay exception and *Crawford*'s

[5] By contrast, there may be greater concern about adversarial interests when a scientist is employed directly by a police agency. *See United States v. Oates*, 560 F.2d 45, 68 (2d Cir. 1977); *see also* Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 Ohio St. L. J. 671, 681-82 (1988).

adversarial interpretation of the Confrontation Clause. *State v. Dedman*, 102 P.3d 628, 635-36 (N.M. 2004).

Potential biases on the part of scientists do not determine whether a statement is testimonial because the Confrontation Clause does not depend on substantive reliability. *See Melendez-Diaz*, 129 S. Ct. at 2537 n.6. The important question for confrontation purposes is whether the public official serves an adversarial or prosecutorial role in judicial proceedings. Non-adversarial scientists are not under any more "pressure" and do not have any greater "incentive," *id.* at 2536, to alter evidence in favor of the prosecution than any other non-law-enforcement public official fulfilling a public duty in making an observation. *See, e.g.*, *Arizona v. Evans*, 514 U.S. 1, 15 (1995) (noting that, unlike police officers, court clerks "have no stake in the outcome of particular criminal prosecutions"); *Manocchio v. Moran*, 919 F.2d 770, 777, 779 (1st Cir. 1990) (determining that there was no reason to believe a medical examiner, who acts more as a physician than a police officer, would not faithfully discharge the "professional and official obligations under the statute"). The observations of scientists who are not part of the law enforcement team are neither self-serving nor prosecutorial; thus, a public record reflecting such observations does not implicate the Confrontation Clause.

3. *Crawford* can be viewed as applying a prophylactic rule that protects the adversary process, and the rule should be narrowly tailored to inquisitorial abuses; an officer's request for scientific analysis is not an interrogation and does not present a danger of prosecutorial abuse.

The text of the Confrontation Clause applies to an "accused" in "criminal prosecutions." U.S. Const. amend. VI. A suspect is not an "accused" and there is no "criminal prosecution" until the initiation of adversary judicial criminal proceedings, which marks "the point at which 'the government has committed itself to prosecute'" and "'the adverse positions of government and defendant have solidified.'" *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)).[6] Nevertheless, the Court has applied the right of confrontation as an exclusionary rule to custodial confessions occurring prior to the commencement of a criminal prosecution because of their similarity to Marian inquisitorial examinations. *Crawford*, 541 U.S. at 52. A custodial confession takes place after an arrest and serves as the "point that our

[6] The Court's early Confrontation Clause jurisprudence involved challenges to statements made during a criminal prosecution. *See, e.g., Pointer v. Texas*, 380 U.S. 400, 406-07 (1965) (preliminary hearing); *Motes v. United States*, 178 U.S. 458, 474 (1900) (examining trial); *Kirby v. United States*, 174 U.S. 47, 54 (1899) (record of a collateral trial).

adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries." *Miranda v. Arizona*, 384 U.S. 436, 477 (1966). Thus, although police officers are neither professional prosecutors nor judicial officers, a custodial interrogation serves a prosecutorial function and is thus inquisitorial in its substance, if not strictly in its form.

In *Crawford*, the Court clarified that the Confrontation Clause targets "the unique potential for prosecutorial abuse." 541 U.S. at 56 n.7. For custodial interrogations, the Confrontation Clause "alleviate[s] the danger of one-sided interrogations by adversarial government officials who might distort a witness's testimony." *Melendez-Diaz*, 129 S. Ct. at 2548 (Kennedy, J., dissenting). This danger is particularly acute for custodial confessions among accomplices, which are "presumptively suspect and must be subjected to the scrutiny of cross-examination." *Lee v. Illinois*, 476 U.S. 530, 541 (1986). "[O]nce partners in a crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices." *Id.* at 544-45; *accord Lilly v. Virginia*, 527 U.S. 116, 137 (1999). *Crawford* and the Court's long line of custodial confession cases exclude statements made before the formal commencement of a criminal prosecution, and before the declarant becomes a formal witness against an

accused,[7] in order to prevent the danger of prosecutorial influence and blame shifting. Viewed in such terms, these cases are perhaps better understood as articulating a prophylactic rule, though the Court has not described the rule in this manner.

In an analogous way, the Court has adopted prophylactic measures to protect the Self-Incrimination Clause, including an exclusionary rule for unwarned pretrial statements. Although a "criminal case" under the Fifth Amendment may not technically begin with a custodial interrogation, *see Chavez v. Martinez*, 538 U.S. 760, 766-67 (2003) (plurality opinion), *Miranda*'s prophylactic exclusionary rule applies to an inquisitorial or prosecutorial relationship between a suspect and the government. *See Escobedo v. Illinois*, 378 U.S. 478, 485 (1964) ("Petitioner had become the accused, and the purpose of the [police] interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so."). Prophylactic rules of this kind

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[7] Petitioner argues that the testing analyst "became a 'witness' against [him] under the Confrontation Clause" when the State elected "to introduce [the] report." Br. 25; *accord* JA 12 ("offered to prove" a fact at trial). This focus on the trial use of a statement is misdirected. The Court has said it is the "character" of a statement that determines whether it is testimonial. *Davis*, 547 U.S. at 821. By itself, the government's use of an out-of-court statement at trial to prove a defendant's guilt does not transform a declarant into a witness against the accused. Otherwise, the Confrontation Clause would apply to all hearsay because hearsay is, by definition, an out-of-court statement offered at trial to prove the truth of the matter asserted.

must be narrowly tailored to fit their prophylactic purpose. *See, e.g., Maryland v. Shatzer*, 130 S. Ct. 1213, 1220 (2010) ("A judicially crafted rule is 'justified only by reference to its prophylactic purpose,' *Davis v. United States*, 512 U.S. 452, 458 (1994), and applies only where its benefits outweigh its costs.")

The scope of the Confrontation Clause's exclusionary rule is governed by the Clause's purpose of preventing trial by inquisition. As a result, it is important that a preliminary police investigation is non-inquisitorial and does not by itself trigger the adversarial protections of the Fifth and Sixth Amendment. *See Berkemer v. McCarty*, 468 U.S. 420, 441-42 (1984) (*Miranda*); *Kirby*, 406 U.S. at 690 (plurality opinion) (no right to counsel during "a routine police investigation"). The danger of a police officer's prosecutorial influence over a declarant, whether a potential suspect, a potential victim, or a bystander, is not the same outside the custodial context.

The facts of *Hammon* help illustrate the different levels of potential prosecutorial influence in police questioning. There, officers spoke to Hershel Hammon in the kitchen, and he said his argument with his wife had not become physical. 547 U.S. at 819. The officers observed signs of an altercation and spoke to Amy Hammon in the living room. *Id.* Based on her account of the incident, an officer had her prepare a battery affidavit. *Id.* at 820. The officer's request for an affidavit served the same prosecutorial function as a Marian examination; it was the first formal accusatorial step toward an arrest and charge. Thus, the

affidavit was a testimonial statement. *Id.* at 821; *id.* at 840 n.5 (Thomas, J., concurring in the judgment in part and dissenting in part).

In contrast, the officer's initial inquiries were not prosecutorial. When the officer spoke to Mr. Hammon, he was not required to provide *Miranda* warnings because, without an arrest, the officer's interview of Mr. Hammon was non-adversarial. The officer had not yet become an inquisitor, and Mr. Hammon had not yet become "enmeshed in the adversary process." *Fare v. Michael C.*, 442 U.S. 707, 719 (1979). The officer's non-inquisitorial role did not change simply by moving from the kitchen to the living room and speaking with a potential victim rather than a potential suspect to continue the preliminary investigation. The officer's interviews with both Mr. and Mrs. Hammon were not the equivalent of a Marian magistrate's examination of a suspect or witness or the secret interrogations of the Star Chamber. These interviews were part of a routine and preliminary police investigation designed to gather facts rather than, as with Mrs. Hammon's affidavit, a prosecutorial attempt to prove a prior accusation.

Despite the extension of the exclusionary rule of the Confrontation Clause to Mrs. Hammon's statement, the Court's precedent shows there is typically no more than a minimal danger of prosecutorial influence in a non-custodial setting. Specifically, the Court has declined to apply the Confrontation Clause to co-conspirator statements procured by the government during a preliminary police investigation

through the use of confidential informants, *Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987), or wiretapping combined with police activity designed to produce incriminatory statements, *Inadi*, 475 U.S. at 396-400. These "unwitting[ ]" statements to the police are "clearly nontestimonial." *Davis*, 547 U.S. at 825. Had there been a substantial danger of prosecutorial abuse at the pre-prosecutorial investigative stage, however, the "unwitting" quality of such statements would not have protected them from Confrontation Clause scrutiny. *Cf. United States v. Henry*, 447 U.S. 264, 270-74 (1980) (excluding statements deliberately elicited by a government informant in counsel's absence after indictment as interfering with the right to counsel but distinguishing the use of "undercover agents to obtain incriminating statements from persons not in custody but suspected of criminal activity prior to the time charges are filed").[8]

In *Melendez-Diaz*, a police officer requested that a scientific analyst prepare an affidavit. 129 S. Ct. at 2535. In contrast, the officer in this case did not ask any analyst a question and instead sent a request for analysis to an institution as a whole. JA 62. The officer made this request at arm's length on a

[8] If there is any attenuated danger of "underhanded prosecutorial tactics" or manipulation (Pet'r Br. 28, 32) in non-custodial settings, these dangers are fully curbed by due process. *See Kirby*, 406 U.S. at 690-91 (plurality opinion); *Melendez-Diaz*, 129 S. Ct. at 2548-49 (Kennedy, J., dissenting); *see also Ash*, 413 U.S. at 320.

standardized form prepared by the Department of Health. *Id.* There certainly was no police interrogation that could be described as "formal" or "a formalized dialogue," *Hammon*, 547 U.S. at 840 (Thomas, J., concurring in the judgment in part and dissenting in part). To the extent this request could be characterized as a "colloquial" police interrogation, *Crawford*, 541 U.S. at 53 n.4, it did not, unlike the request in *Melendez-Diaz*, present any more opportunity for prosecutorial influence than the non-custodial, unwitting statements in *Bourjaily* and *Inadi*. *See Melendez-Diaz*, 129 S. Ct. at 2552 (Kennedy, J., dissenting) ("[L]aboratory tests are conducted according to scientific protocols; they are not dependent upon or controlled by interrogation of any sort.").

C. The *Hammon* primary purpose definition of testimonial should be overruled because it is unworkable, flawed, and overly broad in relation to the purposes of the Confrontation Clause.

The above points show why the *Hammon* definition of testimonial should not be extended to the scientific evidence in this case. Nevertheless, confusion and uncertainty are likely to persist in lower courts due to the fractured positions in *Melendez-Diaz* and the different definitions of testimonial that currently apply to different classes of declarants. As a result, Respondent asks this Court to re-examine the primary purpose definition of testimonial and replace it with a definition that more closely adheres to the

purposes of the Confrontation Clause. The Court has already articulated such a definition, and the Court did so in *Inadi*, the very case cited in *Hammon* for the concept of the functional equivalent of live testimony, 547 U.S. at 828. Under *Inadi*, an out-of-court statement is testimonial if it is a substitute for live testimony, that is, a statement that derives no evidentiary significance from the context in which it was made such that its evidentiary value can be wholly replaced by live testimony.

1. *Stare decisis* is a principle of utmost importance, but it "is not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). The Court will reconsider its precedent, particularly its recent precedent, when it is unworkable or not well reasoned. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89 (2009). Because the primary purpose test is flawed, unworkable, and inconsistent with the purposes of the Confrontation Clause, *Hammon* should be overruled.

The *Hammon* definition is flawed because its focus on objective purposes would, not unlike *Roberts*, require a judge to evaluate the truthfulness of a statement. In *Davis*, for example, the Court concluded that the statement was not testimonial because it was made during "an ongoing emergency" and the declarant, Michelle McCottry, "was speaking about events *as they were actually happening*." 547 U.S. at 827. To reach this conclusion, the Court had to assume the truth of Ms. McCottry's account of the timing and cause of her injuries. *See id.* at 818-19

(noting the injuries did not speak for themselves). Such an analysis contravenes the Court's express rejection of judicial determinations of trustworthiness in the Confrontation Clause's application. *See Giles v. California*, 554 U.S. 353, 365 (2008).

Additionally, the *Hammon* definition is inconsistent with *Crawford*'s procedural interpretation of the Confrontation Clause. "Purpose" evokes notions of intent or motive. There is little reason, other than in considering matters related to substantive reliability such as bias or motive to lie, to analyze a declarant's intent in making a statement. To the extent a private individual may have a prosecutorial motive, a person can anticipate the possible use of a statement in a future prosecution equally well whether making a statement to an acquaintance or to a police officer. There is also little reason to analyze the purpose or motive of an interrogator. As previously noted, the Confrontation Clause does not apply to unwitting statements to the police. Undoubtedly, the officers in *Bourjaily* and *Inadi* had a primary purpose to obtain information they could use in a future prosecution, but the officers' purpose did not offend the Confrontation Clause.

The primary purpose test is unworkable because it does not clarify *whose* purpose must be examined. In *Hammon*, the Court referred to both the police officer's purpose, *see* 547 U.S. at 830, and the declarant's purpose, *id*. at 822 n.1. This inconsistency within *Hammon* has been the subject of ongoing

controversy and litigation in state and lower federal courts.[9]

This definition is also unworkable because an examination of either a declarant's or interrogator's purpose depends, even under an objective standard, on a court's subjective attribution of primacy among the multiple motives inevitably associated with any given declaration. *See Hammon*, 547 U.S. at 839-40 (Thomas, J., concurring in the judgment in part and dissenting in part) (noting that "a hierarchy of purpose . . . will rarely be present" and that a "determination as to the 'primary purpose' of a particular interrogation would be unpredictable"). Thus, the *Hammon* primary purpose definition suffers the same

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[9] This inconsistency has produced at least five approaches. Some courts have adopted the view that the *Hammon* definition requires examination of the declarant's purpose. *See, e.g., United States v. Johnson*, 581 F.3d 320, 325 (6th Cir. 2009), *cert. denied,* 130 S. Ct. 3409 (2010). Other courts examine the questioner's purpose. *See, e.g., United States v. Caraballo*, 595 F.3d 1214, 1229 (11th Cir. 2010). Many courts, particularly in child sexual abuse cases, have identified a third possibility – the purpose of the questioning. *See, e.g., Coronado v. State*, 310 S.W.3d 156, 163 (Tex. App. 2010, pet. granted). As a fourth option, some courts have concluded that both purposes are relevant to determining whether a statement was testimonial. *See, e.g., State v. Franklin*, 308 S.W.3d 799, 817-18 (Tenn. 2010), *petition for cert. filed*, No. 10-5746 (July 28, 2010). Finally, at least one jurisdiction has concluded that for statements that result from police interrogation, the police officer's purpose is examined, but for all other statements, the declarant's purpose is examined. *In re Rolandis G.*, 902 N.E.2d 600, 610 (Ill. 2008), *cert. denied*, 129 S. Ct. 2747 (2009).

flaw as the *Roberts* reliability test: it is based on the amorphous, unpredictable interpretation of subjective criteria. *See Crawford*, 541 U.S. at 62.[10]

As troubling as the unpredictability of the *Roberts* test was, the Court in *Crawford* considered its "fatal flaw" to be its ability to result in admission of statements clearly intended to be excluded by the Confrontation Clause. *Id*. The *Hammon* primary purpose definition suffers from a similar fatal flaw – its ability to result in the exclusion of statements the Framers did not intend to be excluded under the Confrontation Clause. *See Salinger v. United States*, 272 U.S. 542, 548 (1926) (observing that the Framers' purpose was not to broaden the common-law right of confrontation "or disturb the exceptions" existing at the time of founding). For example, the Court in *Crawford* recognized authority for admitting dying declarations, *id*. at 56 n.6, and the Court said over a century ago that "no one would have the hardihood at this day to question their admissibility." *Mattox*, 156 U.S. at 243-44. In spite of this authority, a dying declaration made to a police officer likely meets the *Hammon* primary purpose definition of a testimonial statement.

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[10] For concrete examples of the *Hammon* test's unpredictability and subjectivity, see *People v. Bryant*, 768 N.W.2d 65, 71-75 (Mich. 2009) (4-3 decision reversing the intermediate appellate court based on a different interpretation of the facts), *cert. granted*, 130 S. Ct. 1685 (2010), and *State v. Basil*, 998 A.2d 472, 492 (N.J. 2010) (no majority opinion).

This Court seemed to suggest in *Crawford* that the solution to the dying declaration dilemma is simply to provide for an exception. 541 U.S. at 56 n.6. Yet, "the guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider 'fair.'" *Giles*, 554 U.S. at 375. In other words, the fact that *Hammon*'s primary purpose definition requires exceptions to remain true to the Framer's intent heightens its uncertainty and unpredictability.

More importantly, the need for exceptions to the *Hammon* definition is but a symptom of its more serious flaw – that the definition is inconsistent with the purpose of the Confrontation Clause outlined in *Crawford*. That purpose is to prevent the abusive practice at common law of the use at trial of testimony provided by prosecuting witnesses during post-accusation, pre-trial *ex parte* judicial examinations. 541 U.S. at 43. Indeed, the Court has described the limited application of the Confrontation Clause to testimonial hearsay as "not merely" the "'core'" of the confrontation right, "but its perimeter." *Davis*, 547 U.S. at 824. Yet, *Hammon* establishes a definition of testimonial that applies the confrontation right to statements made under circumstances beyond the kind of *ex parte* judicial examinations that prompted the adoption of the Confrontation Clause.

2. Under *Crawford*, there is one certainty in the meaning of testimonial: a statement made in judicial proceedings under oath is, by definition, the testimony of a witness. *See Crawford*, 541 U.S. at 51; *id.*

at 71 (Rehnquist, C.J., concurring in the judgment); *see also* Black's Law Dictionary 1740 (9th ed. 2009). In addition, the Court has applied an exclusionary rule to certain unsworn testimonial statements, such as custodial interrogations; after all, Lord Cobham's examination was, like other Marian examinations of suspects, unsworn. *See Crawford*, 541 U.S. at 52 & n.3.

To be consistent with the Confrontation Clause's adversarial goals, the definition of testimonial must capture sworn and unsworn adversarial and inquisitorial statements without suffering from the flaw in *Roberts* of under-inclusiveness and the flaw in both *Roberts* and *Hammon* of over-inclusiveness. It must also be administrable. When combined with *Crawford*'s focus on statements taken by adversarial government officers, *Inadi* satisfies these requirements.

In *Inadi*, reliability under *Roberts* was "not at issue." *Inadi*, 475 U.S. at 391 n.3. Rather, the Court addressed whether *Roberts* required a showing of unavailability for all hearsay statements, and more specifically for co-conspirator statements, before permitting their admission at trial. *Id.* at 392. The Court distinguished between two types of statements. The first category, which includes former testimony, "often is only a weaker substitute for live testimony." *Id.* at 394. The second category, however, differs from the first in that its evidentiary significance comes from a "context that cannot be replicated, even if the declarant testifies to the same matters in court." *Id.*

at 395. A co-conspirator statement "often will derive its significance from the circumstances in which it was made. . . . Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy." *Id.* The context of a co-conspirator statement makes it "irreplaceable as substantive evidence." *Id.* at 396. For this reason, unavailability is required only for the first category of statements. *Id.*

Inadi's pre-*Crawford* limitation on the requirement of unavailability for statements made outside of judicial proceedings foreshadowed *Crawford*'s limitation of the Confrontation Clause to testimonial statements; *Inadi* effectively set out a definition of testimonial before the term came to define the scope of the right. As the Court determined in *Inadi*, it would be "'clear folly'" to interpret the Confrontation Clause in a manner that excludes statements bearing independent evidentiary significance. 475 U.S. at 396 (quoted authority omitted); *accord White,* 502 U.S. at 356 ("To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness . . . ."). There is no prophylactic justification for expanding the Confrontation Clause beyond formal "witnesses" when a statement's context provides evidentiary significance apart from its content. Such statements do not substitute for live testimony.

Under *Inadi*, the *jury*, not a judge, determines the trustworthiness of an out-of-court statement. The

judge merely determines whether a statement is a substitute for live testimony or something other than testimony. A judge need only make a routine gatekeeping assessment of the relevance of a statement's context, and *Inadi* provides the test for relevance: whether a statement's evidentiary value can be replicated by in-court testimony or, instead, whether a statement's context is irreplaceable.

Although the Court has not previously described the scope of the Confrontation Clause in these express terms, the Court's holdings hew closely to this line. A statement under oath, such as an affidavit, a deposition, preliminary hearing testimony, or grand jury testimony, has no independent evidentiary significance and serves the same role as trial testimony. Some statements not made under oath, such as custodial interrogations, also serve the same role as trial testimony.

Other unsworn statements, however, are important to the truth-seeking function of a trial based on the circumstances in which they are made. The Court has found no Confrontation Clause violation in the admission at trial of (1) the post-charge co-conspirator statement to a cellmate in *Dutton v. Evans*, 400 U.S. 74, 77, 87-89 (1970) (plurality opinion), (2) the unwitting co-conspirator statements to the police in *Bourjaily* and *Inadi*, (3) the excited utterances by a victim to a relative and to a police officer during a preliminary investigation in *White*, 502 U.S. at 350-51, 355-56, (4) a further statement by the victim in *White* to a nurse and a physician for

purposes of medical treatment, *id.*, and (5) the statement by the victim in *Davis* during an ongoing emergency. The Court has also repeatedly endorsed dying declarations. *See Pointer*, 380 U.S. at 407; *Dowdell v. United States*, 221 U.S. 325, 330 (1911); *Kirby*, 174 U.S. at 61; *Mattox*, 156 U.S. at 243-44. The common thread in these cases is that, regardless of whether the statements were made to or in the presence of a police officer, the statements had independent evidentiary significance within the meaning of *Inadi* and did not simply substitute for live testimony. *See Davis*, 547 U.S. at 828 ("No 'witness' goes into court to proclaim an emergency and seek help."); *White*, 502 U.S. at 356 ("[T]he out-of-court statements admitted in this case had substantial probative value that could not be duplicated simply by the declarant later testifying in court."); *see also Crawford*, 541 U.S. at 74 (Rehnquist, C.J., concurring in the judgment) (observing that reasons similar to those expressed in *Inadi* "justify the introduction of spontaneous declarations, statements made in the course of procuring medical services, dying declarations, and countless other hearsay exceptions") (citations omitted).[11]

[11] The facts in *Idaho v. Wright*, 497 U.S. 805 (1990), do not reveal whether the child's statements to a physician in response to leading questions would qualify as testimonial. To the extent *Wright* can be read as inconsistent with *Inadi*'s (or even *Hammon*'s) definition of testimonial, the Court's opinion is easily explained by *Roberts*' application of the Confrontation Clause to all hearsay rather than the testimonial statements of witnesses against the accused. *See Whorton*, 549 U.S. at 420. Even if the

(Continued on following page)

Inadi provides a definition of testimonial with a close fit to the procedural purposes of the Confrontation Clause identified in *Crawford*. To further the adversarial focus of the Clause and the prophylactic effect of its exclusionary rule, a testimonial statement should be defined as a statement to a prosecuting or judicial officer that has no "independent evidentiary significance of its own." *Inadi*, 475 U.S. at 394.

Under this definition, the report in this case is nontestimonial. It contains the contemporaneous recording by a public official under a non-adversarial public duty to make an observation.[12] The laboratory conditions and duty to observe could not have been

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statements in *Wright* were nontestimonial, their unreliability may still be addressed by hearsay rules and due process protections.

[12] Petitioner (Br. 12, 34) and Professor Friedman (Friedman Br. 15) refer broadly to declarants who make observations without recognizing the distinction between testimonial and nontestimonial statements of observation. A declarant's recollection of a randomly observed license plate number differs from a contemporaneous recording made under a non-adversarial public duty. *See Orozco*, 590 F.2d at 793 (discussing "the simple recordation of license numbers of all vehicles which pass [the law enforcement officer's] station"). *Melendez-Diaz* did not involve a public duty to make an observation; the law at issue instead imposed a public duty to prepare an affidavit. *See* 129 S. Ct. at 2532. A public duty to testify does not make the testimony a public record. In the same way as a public official's appearance as a witness at trial, the public official's affidavit in *Melendez-Diaz* served an adversarial role, and the context of the affidavit's preparation provided no evidentiary significance beyond its content.

replaced by live testimony. "Witnesses" do not perform scientific tests in a laboratory, and scientists do not go into court to make a contemporaneous recording of their results.

II. EVEN IF THE REPORT IS TESTIMONIAL, ADMISSION OF THE REPORT WITHOUT THE ANALYST'S APPEARANCE AT TRIAL DID NOT DEPRIVE PETITIONER OF THE RIGHT OF CONFRONTATION.

A. The opportunity to confront machine-generated raw data by retesting is at least equivalent to cross-examination as a means of in-trial confrontation.

The text of the Sixth Amendment states that an accused has the right to be "confronted with the witnesses against him." U.S. Const. amend. VI. It does not state that an accused has the right to confront witnesses *only* through cross-examination. *See California v. Green*, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring). Cross-examination is a mechanism for confrontation. *See Crawford,* 541 U.S. at 61. But it is not the only mechanism. When the evidence at issue is raw data, the opportunity for retesting is equivalent to the opportunity to cross-examine required under *Crawford*. *Cf. Ash*, 413 U.S. at 319 (determining that the opportunity to repeat a photographic lineup "fully satisfies the historical spirit of the Sixth Amendment's counsel guarantee");

Gilbert v. California, 388 U.S. 263, 267 (1967) (similar for a handwriting exemplar).[13]

As Amici Law Professors recognize, Profs. Br. 11-12, *Crawford* itself acknowledged one permissible substitute for in-trial confrontation: admission of out-of-court testimony when the witness is unavailable and the defendant has had a prior opportunity for cross-examination. 541 U.S. at 54. Such a substitute is permissible because certain adversarial protections of confrontation, such as the need for a jury to observe a witness's demeanor, "must occasionally give way to considerations of public policy and the necessities of the case." *Mattox*, 156 U.S. at 243.

In *Ash*, the Court recognized that certain procedures can "cure a one-sided confrontation between prosecuting authorities and the uncounseled defendant." 413 U.S. at 315. Such procedures include "accurate reconstruction" of the confrontation. *Id.* at 316. Likewise, accurate reconstruction of the making of an out-of-court statement can cure the accused's inability to confront the statement when it is made. Although accurate reconstruction is often not possible, particularly for statements by a person, it is possible when the statement is raw data or a mere

[13] The Court's mention of the ability to cross-examine an expert at trial in *Gilbert* does not assist in resolving this case because the right of confrontation was not at issue and the Court did not distinguish between adversarial and non-adversarial scientific testing or between subjective expert opinions and objective scientific observations capable of reconstruction.

transcription of raw data onto a public record. The opportunity for retesting fulfills the role of cross-examination by fully exposing grounds, if any exist, for the jury to dismiss the evidence as unreliable or untrustworthy. Indeed, retesting satisfies the goals of cross-examination advanced by Petitioner (Br. 16-17) by providing an opportunity to test (1) the analyst's recollection, (2) the analyst's veracity, (3) ambiguity in the result, (4) the analyst's skill, and (5) any transposition in the transcription. Therefore, the adversarial protection of the Confrontation Clause is satisfied by the "possibility of perfect reconstruction" through retesting of the blood sample. *Ash*, 413 U.S. at 319 n.13.

Indeed, retesting is a more effective means of confrontation than mere cross-examination. Given the manner in which laboratories conduct chemical analyses – in large batches with individual samples identified by number for scientific control purposes[14] – it is nearly certain that a testing analyst will not be able to distinguish one blood sample from another or remember a particular test from a particular day. As a result, cross-examination of the analyst to expose errors in the testing or transcription rarely, if ever, yields fruit. Yet, if such errors occurred, retesting is certain to reveal the truth. Retesting, therefore, is not merely a substitute for confrontation or an alternative "trial strategy" as indicated in *Melendez-Diaz*,

[14] Scientific Lab. Div., N.M. Dep't of Health, *Scientific Laboratory Division Fall/Winter News* 2 (2010), http://www.sld.state.nm.us/documents/SLD2010FallWinter.pdf.

129 S. Ct. at 2536 (acknowledging that retesting may be more effective than cross-examination). Instead, it is a method of confrontation that is equivalent, if not superior, to cross-examination.

For that reason, the unavailability requirement of *Crawford* is inapplicable when scientific results may be confronted by retesting. Substitutes for in-trial confrontation are based on a rule of necessity. *Mattox*, 156 U.S. at 243; *Barber v. Page*, 390 U.S. 719, 722 (1968). Unavailability is required to justify substituting prior cross-examination for in-trial confrontation because the in-trial confrontation is "the better evidence. But if the declarant is unavailable, no 'better' version of the evidence exists, and the former testimony may be admitted as a substitute for live testimony on the same point." *Inadi*, 475 U.S. at 394-95. Conversely, when another means of in-trial confrontation is not just a "second-best" mechanism for confrontation (Profs. Br. 12, 15) but the equivalent of cross-examination, there is no necessity for the unavailability requirement.

Moreover, contrary to the Professors' proposed test (Profs. Br. 11), the Confrontation Clause does not place the burden on the government to confront prosecution witnesses on the defendant's behalf. *See Melendez-Diaz*, 129 S. Ct. at 2541 (discussing notice-and-demand statutes). Because retesting is equivalent to cross-examination as a mechanism for in-trial confrontation, a defendant is not denied the right to confrontation when he has the opportunity to retest but chooses not to do so, any more than he is denied

the right when he chooses not to cross-examine a witness at trial. After all, the Confrontation Clause assures a defendant the opportunity to confront witnesses, *see United States v. Owens*, 484 U.S. 554, 559 (1988), an opportunity the defendant may waive, *see Brookhart v. Janis*, 384 U.S. 1, 4-5 (1966). Petitioner had an opportunity to confront the test result through retesting. Therefore, the transcription of the test result was admissible, even if it is considered testimonial.

B. A witness with knowledge of laboratory procedures and the functioning of the machine testified at trial and was cross-examined.

Unlike in *Melendez-Diaz*, an analyst with the Department of Health appeared at trial in this case. As a result, Petitioner had a complete opportunity to question the witness about his testimony on the laboratory procedures printed by the Department of Health on the back of the report (JA 49-56), the functioning and accuracy of the gas chromatograph (JA 54), and the foundation for admitting the report as a public or business record (JA 51). Together with the opportunity for retesting, this opportunity for cross-examination satisfied the adversarial requirements of the Confrontation Clause.

Petitioner (Br. 31) argues that he should have been able to probe the testing analyst's credibility, but the same argument could be made about any public

official responsible for a public record. The reality is that such individuals do not remember any single one of the numerous routine observations made on a daily basis in their official capacity, and their testimony at trial would consist of their review of the document. *Cf. Dutton*, 400 U.S. at 89 (plurality opinion) ("[T]he possibility that cross-examination . . . could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal."). Petitioner also argues that cross-examination might have shown the analyst transposed the numbers on the machine. Br. 34. Aside from the fact that the result in this case would have been inculpatory regardless of such a transposition (.21 or .12), the same argument could be made about any copyist.

The right of confrontation does not provide for an ideal attack on evidence mounted by the most skilled counsel, as Petitioner seems to propose. There may arguably be an incidental benefit to cross-examining all public officials about the records they make or all copyists about their transcriptions. But "[t]he law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Mattox*, 156 U.S. at 243. Our adversarial system provides other protections, including the right to compel witness testimony, *see Inadi*, 475 U.S. at 397-98, discovery, and the requirement that prosecutors disclose exculpatory or impeaching evidence, such that the absence of an incidental aspect of confrontation would not, as Petitioner suggests (Br. 12, 31), "prevent[ ]" him from

discovering favorable evidence or "shield potentially damning information." Indeed, Petitioner used a common and effective means of challenging evidence by attacking the results of the test through closing argument. JA 61; *see Manocchio*, 919 F.2d at 781 & n.20 (noting that argument of defense counsel and compulsory process minimize any risk of prosecutorial abuse); *cf. Owens*, 484 U.S. at 560 (referring to "realistic weapons" to attack evidence other than successful cross-examination such as "defense counsel's summation").

Petitioner contends that witnesses cannot testify beyond their personal knowledge.[15] Br. 31. This contention, like Professor Friedman's position on Evidence Rule 703 (Friedman Br. 12 n.8), would virtually bar experts for the prosecution because it disregards both the nature of expert testimony and the long-understood notion that "[n]o one professional man can know from personal observation more than a minute fraction of the data which he must every day treat as working truths." 1 John Henry Wigmore,

[15] The term "surrogate" is far too imprecise. Any witness testifying to the hearsay of another, whether testimonial or nontestimonial, could be considered a surrogate lacking the declarant's personal knowledge. Surrogacy could also include an employee or records custodian testifying on behalf of an entity that can only appear at trial through its agents. The witness in the present case, Mr. Razatos, was not a surrogate. Aside from reading a report that was introduced as an exhibit (JA 55), Mr. Razatos offered no opinion about Petitioner's blood alcohol content and did not purport to testify to the personal knowledge of the testing analyst.

Evidence § 665 (1904). The fair administration of criminal justice cannot tolerate such overwhelming burdens for the mere whisper of a benefit Petitioner advocates. *See* States' Amici Br.

With respect to Petitioner's argument that an expert cannot be a mere conduit for another expert's opinion, the New Mexico Supreme Court so held in the companion case of *State v. Aragon*, 225 P.3d 1280, 1290-91 (N.M. 2010). The state court's ruling in the present case does not permit conduit testimony; instead, it properly holds that Petitioner's right of confrontation was adequately protected.

III. IF THE TRIAL COURT ERRED IN ADMITTING THE REPORT, OR ANY PART OF THE REPORT, THE ERROR WAS HARMLESS.

Confrontation Clause errors are subject to a harmless error inquiry, *see Davis*, 547 U.S. at 829, a question raised but not resolved in the state court. New Mexico recognizes two independent means of proving intoxication, one based on impairment and one based on alcohol concentration in the breath or blood (*per se*). N.M. Stat. Ann. § 66-8-102(A), (C) (2010). Contrary to Petitioner's statement of the case (Br. 2, 3, 8), the trial court did not instruct the jury on *per se* DWI (R. 75-76), and the State introduced a great deal of evidence beyond the report to show that Petitioner drove while impaired. Further, Petitioner's aggravated blood alcohol level did not affect his sentence as a fifth-time DWI offender. *See* N.M. Stat.

Ann. § 66-8-102(H). Therefore, if there was any error in admitting the report, Respondent asks this Court to remand to the state court to determine in the first instance whether the error was harmless beyond a reasonable doubt. *See Melendez-Diaz*, 129 S. Ct. at 2542 n.14.

CONCLUSION

For the foregoing reasons, the judgment of the New Mexico Supreme Court should be affirmed.

Respectfully submitted,

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