No. 07-7577

In The Supreme Court of the United States

BRIAN T. O'MALEY,

Petitioner,

v.

THE STATE OF NEW HAMPSHIRE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

BRIEF OF AMICUS CURIAE THE NATIONAL COLLEGE FOR DUI DEFENSE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

WHETHER NEW HAMPSHIRE'S PROCEDURE IN DRUNK DRIVING CASES, WHICH PERMITS THE ADMISSION AGAINST THE DEFENDANT OF A BLOOD ALCOHOL TEST RESULT WITHOUT AN OPPORTUNITY FOR CROSS-EXAMINATION OF THE NURSE WHO WITHDREW THE BLOOD OR THE CHEMIST WHO TESTED THE BLOOD VIOLATES THE CONFRONTATION CLAUSE?

LIST OF INTERESTED PARTIES

The caption contains the names of all the parties below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National College for DUI Defense is a non-profit professional organization founded in 1995. The mission of the College includes assisting its members in the defense of their clients charged with drinking and driving offenses and the advancement of liberty through constitutional advocacy. The College has approximately 850 members throughout the United States and sponsors or co-sponsors at least four major continuing education programs annually specializing in issues relating to the defense of persons charged with driving under the influence. The College's Summer Program has been continuously presented at the facilities at Harvard Law School since 1996. Winter Sessions have been given every year since 1997. The College also co-sponsors training and educational seminars with the National Association of Criminal Defense Lawyers and the Texas Criminal Defense Lawyers' Association.

The National College for DUI Defense believes that the Confrontation Clause issue raised by O'Maley's Petition is extremely important due to the unsettled state of the law, the numerous conflicting reported decisions, and the frequency with which

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[1]The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

this issue occurs in trial courts nationwide. This Court should grant the Petition, reverse the New Hampshire Supreme Court, and hold that defendants such as O'Maley have a Sixth Amendment right to cross-examine the technicians who conduct blood tests.

REASON FOR GRANTING THE WRIT

NEW HAMPSHIRE'S PROCEDURE IN DRUNK DRIVING CASES, WHICH PERMITS THE ADMISSION AGAINST THE DEFENDANT OF AN ALCOHOL BLOOD TEST RESULT WITHOUT AN OPPORTUNITY FOR CROSS-EXAMINATION OF THE NURSE WHO WITHDREW THE BLOOD OR THE CHEMIST WHO TESTED THE BLOOD, VIOLATES THE CONFRONTATION CLAUSE

SUMMARY OF ARGUMENT

The Supreme Court, in *Crawford v. Washington*, 541 U.S. 36 (2004), stated a new rule to determine when and whether the admission of hearsay at a trial violates the Sixth Amendment Confrontation Clause. If the hearsay is "testimonial" it may only be admitted if the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. Otherwise the witness must be present and subject to cross-examination. As a result of *Crawford*, many courts have had to reexamine previously well-settled law concerning admission of hearsay. In drunk driving cases, there are two types of witnesses who have testimony to offer relevant to the admission of blood and breath alcohol test results. The first kind of witness is usually an officer who administers a breath test, a nurse who draws blood directly from the defendant, or chemist who personally tests the defendant's

blood and completes an affidavit detailing what he did or signs a print out or other document bearing test results. The second kind of witness is the person who examines, tests, and in many jurisdictions, certifies the equipment used in the breath or blood test and prepares an affidavit so stating. This brief will collectively refer to these witnesses as "blood and breath test technicians." This brief argues that both kinds of statements are "testimonial" because: they qualify under general formulations of "testimonial" discussed in *Crawford*, 541 U.S. at 51-52; there is a historical basis for considering these statements to be testimonial, i.e., they are more analogous to coroner statements than mere business records because blood and breath testing is done for purposes of litigation; the better reasoned lower court cases hold that blood and breath technician statements are "testimonial"; there is a need to cross-examine the blood and breath test technicians in order to challenge the accuracy and reliability of the test result; this Court's due process cases have assumed the ability to cross-examine these witnesses; and cases and news stories contain numerous examples of incompetence, neglect, accident, and fraud, with respect to scientific evidence, which could only be fully uncovered with the aid of cross-examination. Therefore, *Crawford* requires the presence of these witnesses in court for cross-examination, in the absence of unavailability and a prior opportunity to cross-examine, in order for test results to be admitted in evidence.

In *O'Maley v. State*, 932 A.2d 1 (N.H. 2007), *petition for cert. filed* (Nov. 9, 2007)(No. 07-7577), the New Hampshire Supreme Court affirmed a

conviction for driving under the influence where the blood alcohol test reading of the Petitioner was allowed in evidence without any opportunity for cross-examination of the nurse who withdrew the blood or the chemist or technician who tested it. Because the issue presented by O'Maley's case is an issue that is litigated frequently in drunk driving cases nationwide with conflicting results, and has not been resolved by the *Crawford* cases this Court has decided to date, the Petition for a Writ of Certiorari should be granted.

I. *Crawford v. Washington* requires the statements of breath and blood test technicians to be considered testimonial.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court determined that the admission of "testimonial" hearsay at a trial violates the Sixth Amendment Confrontation Clause unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness, overruling *Ohio v. Roberts*, 448 U.S. 56 (1980). The Court noted that the Framers did not intend for the reliability of a statement to be determined preliminarily by judges, but rather to be made by fact-finders after being tested through cross-examination, *Crawford*, at 61-62, and that other courts had made preliminary reliability determinations under *Roberts* inconsistently and incorrectly. *Id.* at 62-64.

While *Crawford* does not define the term "testimonial," it does offer some examples of possible definitions.

Various formulations of this core class of "testimonial" statements exist: "ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition-for example, *ex parte* testimony at a preliminary hearing.

Crawford, at 51-52. The Court also gave other specific examples of kinds of statements that historically either were or were not "testimonial." For example, it noted that coroner statements were not allowed in American courts. *Id.* at 47, 49. Police interrogations, the kind of statements at issue in *Crawford*, fall well within any definition of the term "testimonial." *Id.* at 52-53. On the other hand, the Court said that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial - - for example, business records or statements in furtherance of a conspiracy." *Id.* at 56.

The Supreme Court recently revisited the issue of testimonial vs. nontestimonial hearsay in light of *Crawford*, in its decision in *Davis v. Washington*, -- U.S.--, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). In that case, the Court held:

> [s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that *the primary purpose of the interrogation is to establish or prove past events relevant to later criminal prosecution.*

126 S.Ct. at 2273-74 (emphasis added). The Court

went on to clarify that "this is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial." *Id.* n1. Testimonial statements are also not restricted to statements given in prior court proceedings.

> "But the English cases that were the progenitors of the Confrontation Clause did not limit the exclusionary rule to prior court testimony and formal depositions, see *Crawford*, *supra*, at 52, and n. 3."

Id. at 2276. The Court reaffirmed that whatever else may be included within the meaning of "testimonial statements," for Confrontation Clause purposes, they certainly include "formal" declarations intended to establish or prove a fact.

> It is, in the terms of the 1828 American dictionary quoted in *Crawford*, "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" 541 U.S., at 51.

Id.

Even the dissent recognized that the Confrontation Clause prevents substituting an *ex parte* statement in lieu of live testimony at trial.

> Because the Confrontation Clause sought to regulate prosecutorial abuse occurring through use of *ex parte* statements as evidence against the

> accused, it also reaches the use of technically informal statements when used to evade the formalized process. *Cf. Ibid.* That is, even if the interrogation itself is not formal, the production of evidence by the prosecution at trial would resemble the abuses targeted by the Confrontation Clause if the prosecution attempted to use out-of-court statements as a means of circumventing the literal right of confrontation, *see Coy v. Iowa*, 487 U.S. 1012 (1988). In such a case, the Confrontation Clause could fairly be applied to exclude the hearsay statements offered by the prosecution, preventing evasion without simultaneously excluding evidence offered by the prosecution in good faith.

Id. at 2283.

Using the definitions and examples set forth in *Crawford* and *Davis* as a guide, affidavits or statements of breath and blood test technicians must be considered to be testimonial. Statements of breath and blood test technicians qualify under all of the formulations referred to by the Court, "'affidavits . . . that the defendant was unable to cross-examine . . . that declarants would reasonably expect to be used prosecutorially,'" "'formalized testimonial materials, such as affidavits,'" and "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later

trial.'" *Crawford*, at 51-52. With reference to the Court's specific kinds of statements, affidavits of breath and blood technicians are also more analogous to coroner statements than mere business records because they are scientific in nature, and are prepared by the police or state employees pursuant to statute and regulation for use in litigation against the defendant in criminal cases. Additionally, breath and blood test results are affirmations made for the purpose of proving a fact in a criminal prosecution, making them testimonial under *Davis*.

II. The better reasoned cases consider statements of breath and blood test technicians to be "testimonial."

The lower courts are divided on the question presented here: whether the affidavits or statements of breath and blood test technicians are testimonial. The decisions turn generally on whether the court finds the statement to be a mere business record. For example in the following cases, courts have found statements of blood and breath test technicians to be testimonial. *Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005)(nurse who withdrew blood was a testimonial witness, but statute requiring proffer of dispute with testimony prior to confronting witness did not violate Confrontation Clause); *Belvin v. State*, 922 So.2d 1046 (Fla. App. 4th Dist. 2006)(portions of breath test affidavit pertaining to non-testifying breath test technician's procedures and observations in administering test were testimonial hearsay requiring prior opportunity for cross-examination); *State v. Renshaw*, 915 A.2d 1081 (N.J. App. Div. 2007)(blood alcohol test certificate is

testimonial); *State v. Kent*, 918 A.2d 626, 636-40 (N.J.Super.Ct.App.Div.2007)(State Police chemist's lab report and a blood test certificate). Other courts have reached a similar conclusion regarding affidavits or statements of technicians in drug and other criminal cases. *E.g.*, *People v. McClanahan*, 729 N.E.2d 470 (Ill. 2000)(pre-Crawford decision holding Illinois provision allowing drug report in evidence without showing of unavailability of technician violated the Confrontation Clause); *People v. Rogers*, 780 N.Y.S.2d 393 (N.Y.App. Div.2004)(blood alcohol result of alleged sexual assault victim inadmissible because defendant had right to cross-examine witnesses regarding authenticity of sample and cross-examine regarding the testing methodology); *Johnson v. State*, 929 So.2d 4 (FlaApp. 2 Dist. 2005)(law enforcement lab report establishing illegal nature of substances defendant possessed was testimonial hearsay); *Commonwealth v. Carter*, 861 A.2d 957, 969 (Pa. Super.Ct. 2004)(lab report identifying a confiscated substance as cocaine constituted inadmissible hearsay and its admission violated defendant's right to confront witnesses against him "when the court admitted the lab report without the testimony of the forensic scientist who performed the mechanics of the testing and prepared the report"); *State v. Moss*, 160 P.3d 1143, 1149 (Ariz. Ct. App. 2007)(blood test result given by lab director who did not test blood was testimonial); *State v. Crager*, 844 N.E.2d 390, 397 (Ohio App. 2005)(lab reports prepared solely for prosecution are testimonial); *State v. Miller*, 144 P.3d 1052, 1060 (Or.App. 2006)(lab report result that urine contained methamphetamine is testimonial); *Thomas v. United States*, 914 A.2d 1, 5 (D.C. 2006),

cert. den., 128 S.Ct. 241 (2007)(admission of chemist's report violated *Crawford*); *People v. Lonsby*, 707 N.W.2d 610, 618-21 (Mich.App. 2005) (notes and lab report of crime lab serologist); *State v. Caulfield*, 722 N.W.2d 304, 309-10 (Minn. 2006) (lab report identifying substance as cocaine); *Deener v. State*, 214 S.W.3d 522, 526 (Tex.Crim.App.2006) (chain of custody affidavit and certificate of analysis identifying substance as cocaine); *Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo. 2007)(lab report testimonial hearsay but confrontation could be waived by failing to file demand under notice and demand statute); *State v. March*, 216 S.W.3rd 663 (Mo. 2007), p*etition for certiorari filed,* 76 USLW 3001 (Jun 18, 2007)(No. 06-1699)(laboratory report identifying substance as cocaine); *State v. Laturner*, 163 P.3d 367 (Kan.App. 2007)(laboratory test result was testimonial); *cf.*, *People v. Hernandez*, 794 N.Y.S.2d 788, 789 (N.Y.Sup.Ct. 2005)(latent fingerprint report is testimonial, though it is a business record, because the fingerprints "were taken with the ultimate goal of apprehending and successfully prosecuting a defendant").

Other courts have reached the opposite conclusion, that such reports, affidavits or statements are business records and therefore non-testimonial, admissible hearsay. *People v. Johnson*, 18 Cal.Rptr.3d 230 (Cal.Ct.App. 2004)(laboratory reports); *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005)(laboratory report on weight of cocaine); *State v. Dedman*, 102 P.3d 628 (N.M. 2004)(blood alcohol content reports); *People v. Brown*, 801 N.Y.S.2d 709 (N.Y.Sup.Ct. 2005)(DNA testing records); *People v. Kanhai*, 797 N.Y.S.2d 870

(N.Y.Crim.Ct. 2005)(breathalyzer test results); *People v. Durio*, 794 N.Y.S.2d 863 (N.Y.Sup.Ct. 2005)(autopsy reports); *Denoso v. State*, 156 S.W.3d 166 (Tex.App. 2005)(autopsy reports); *Luginbyhl v. Commonwealth*, 618 S.E.2d 347 (Va.App. 2005)(report from breathalyzer machine and technician's certificate of calibration were business records); *Green v. DeMarco*, 812 N.Y.S.2d 772 (N.Y. Sup. 2005)(admission of breath test reading did not violate Confrontation Clause); *Napier v. State*, 827 N.E.2d 565 (Ind.App. 2005), *cert. den.*, 546 U.S. 1215 (2006)(breath test reading); *O'Maley v State*, 932 A.2d 1 (N.H. 2007), *petition for cert. filed* (Nov. 9, 2007)(No. 07-7577)(blood sample collection form and analyst's report); *compare*, *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007)(blood test result was not hearsay, was not subject to Confrontation Clause analysis, and was not testimonial).

The states disagree on whether certification records for the machines used to test the defendants' breath or blood are classified the same way as the testimony of the test technician which is held to be testimonial. *Compare*, *e.g.*, *Shiver v. State*, 900 So.2d 615, 618 (Fla. App. 2005)(affidavit prepared by officer that stated that breath test instrument was properly calibrated constituted testimonial hearsay evidence), *with*, *State v. Shisler*, 2006 WL 2846339, 2006-Ohio-5265 (Ohio App. 1 Dist. Oct 06, 2006)(breath test inspection certificates), *and*, *People v. Kim*, 859 N.E.2d 92 (Ill.App. 2 Dist. 2006)(certifying affidavit not testimonial).

The cases holding that statements of blood

and breath technicians and certifying affidavits are testimonial are more persuasive for a number of reasons. As noted above, these cases are consistent with *Crawford's* proposed formulations of testimonial hearsay, as well as the historical practice in this country of excluding coroner statements. Blood and breath test technician statements are prepared pursuant to statute and regulation *solely* for the purpose of litigation in criminal cases. Additionally, in drunk driving cases, where the allegation is a violation of a driving under the influence per se statute, the test is quantitative, as opposed to qualitative, and the result constitutes the sole evidence of an element of the offense. In fact, assuming the defendant can be shown to have been driving, the test result essentially *is* the offense. Furthermore, due to the nature of blood and breath testing, there are many issues relating to the accuracy and reliability of the test result which are relevant to admissibility and/or weight of the evidence and which constitute fertile ground for cross-examination.[2] In order to challenge the accuracy and reliability of any test, the defendant must be able to fully cross-examine the blood and breath technicians.

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[2]Drunk driving cases are typically comprised of the observations of witnesses, usually police officers, standardized and/or unstandardized field sobriety tests, and a breath test. This evidence is often inherently unreliable, subjective and can be difficult to defend against. The observational evidence is often susceptible to more than one interpretation, consistent with both guilt and innocence. *See, e.g., United States v. Horn*, 185 F.Supp.2d 530 (D.Md. 2002)(concluding that standardized field sobriety tests were too unreliable to satisfy the requirements of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)).

III. There is a need to cross-examine the blood test technician in order to challenge the accuracy and reliability of the test result

In order to properly evaluate the appellant's claims with respect to the blood test, it is necessary to have an understanding of the process of the gas chromatography, the components of the test, and precision required to produce an accurate and reliable test result. The process begins with the phlebotomist who withdraws the blood. The phlebotomist must be properly trained. Diana Garza and Kathleen Becan-McBride, *Phlebotomy Handbook*, at 3, 6 (7th ed., Pearson/Prentice Hall 2005). It is necessary that the area of the arm where blood is extracted be properly swabbed away from the collection site, with a non-alcohol swab, that the needle be properly inserted into the vein, and other procedures followed, in order to maintain sterility and avoid contamination. *Id.* at 272-74, 441; William H. Anderson, *Collection and Storage of Specimens for Alcohol Analysis*, Medical-Legal Aspects of Alcohol 237, 239 (James C. Garriott ed., 4th ed., 2003). The vacuum tube used for collection must be properly selected and must have within it sufficient levels of sodium fluoride (to inhibit growth of micro-organisms that can ferment ethanol from sugar in the blood) and potassium oxalate (to prevent clotting). Yale Caplan, *The Determination of Alcohol in Blood and Breath*, Forensic Science Handbook, at 606-07 (Richard Saferstein ed., Prentice Hall 1982). It must be within the expiration date, to provide assurance that the vacuum seal has not been compromised and air

laden with bacteria admitted that can contaminate the sample, as well as assurance that the additives are still effective. Garza and Becan-McBride at 35. The tube must be properly filled. *Id.* at 279. The tube must be withdrawn properly from the needle so that air is not drawn into the tube. The phlebotomist must then invert, not shake, the tube a required number of times to assure the proper mixing of the chemicals with the blood. National Committee on Clinical Laboratory Standards (NCCLS), *Blood Alcohol Testing in the Clinical Laboratory; Approved Guideline*, at 6, NCCLS Document T/DM6-A (ISBN 1-56238-333-7)(1997); Garza and Becan-McBride, at 274; Lawrence Taylor and Steven Oberman, *Drunk Driving Defense* at 117-18 (6th ed. Aspen 2006, 2007-2 Cum. Supp.); s*ee, e.g., State v. Schwalk*, 430 N.W. 2d 317 (N.D. 1988)(failure to demonstrate compliance with required procedures required exclusion of test results).

> Quite simply, *if the blood is not adequately mixed with the anticoagulant*, the anticoagulant will be ineffective, with the inevitable consequence that clotting will subsequently take place, resulting in a higher BAC.

Taylor and Oberman, at 571 (6th ed. Aspen 2006)(emphasis in original).

The tube must then be properly sealed, labeled, and stored prior to testing. Caplan. In order to minimize the possibility of production of

ethanol in the sample, the sample should be refrigerated while being stored, prior to testing. *See e.g.*, Kaye, *The Collection and Handling of the Blood Alcohol Specimen*, 74 Am. J. Clinical Pathology 743 (1980); Chang & Kollman, *The Effect of Temperature on the Formation of Ethanol by Candida Albicans*, 34(1) Blood, J. Forensic Sci. 105 (1989); Blume & Lakatua, *The Effect of Microbial Contamination of the Blood Sample on the Determination of Ethanol Levels in Serum*, 60 Am. J. Clinical Pathology 700 (1973); Taylor and Oberman, at 117 (2007-2Cum.Supp.),*citing*, http://www.bd.com/vacutainer/faqs/#venous_faq (last visited May 18, 2007)(need to check sterilization of tubes, storage temperature of tubes before use, expiration date of tubes, whether full volume of blood was drawn, refrigeration of blood after withdrawal, and seal on tubes).

At the laboratory, there are numerous steps the chemist must take to assure the accuracy and reliability of the test. Chromatography is defined as "a separation process based on the differential distribution of sample components between a moving and stationary phase." David T. Stafford, *Chromatography*, Principles of Forensic Toxicology, 89 (2nd ed., Barry Levine, ed. AACC Press 2003). The equipment used includes "a carrier gas supply, a flow controller, an injector port, a column housed in an accurately thermostated oven, a sensitive detector, an electrical amplifier and a recorder." Richard Erwin, *Defense of Drunk Driving Cases, Criminal/Civil* at 17-31 (Matthew Bender 2007).

The chemist must load many different samples by way of pipet from larger vials, to the

smaller vials used by the instrument . This includes calibration samples, the concentrations of which should range from values less than to values greater than the anticipated concentration of the sample being tested. A calibration curve may be generated with the data obtained from the analysis of these calibration solutions generated. The concentration of the sample being tested is determined by comparison with the values on the calibration curve. Erwin at 17-35. Additionally, the chemist must add an internal standard, e.g., n-propanol, to all samples being analyzed. The purposes of the internal standard are to minimize the likelihood that variations in instrument function will affect the results and to provide a frame of reference for identification and quantitation of the ethanol in the test sample. Don Nichols and Flem Whited, *Drinking/Driving Litigation: Criminal and Civil*, § 23:12 (West 2007). Pipets must be calibrated. *Id.* Care must be taken to assure that the control and calibration solutions are not the same, and that all calibrators, controls, blanks, internal standards, and standard mix solutions are traceable to NIST (National Institute of Standards and Technology). NCCLS; Barbara J. Basteyns and Graham R. Jones, *Quality Assurance*, Medicolegal Aspects of Alcohol 229, 232 (James C. Garriott, 4th ed. 2003); *cf.*, *City of Seattle v. Clark-Munoz*, 93 P.3d 141, 146 (Wa. 2004)(en banc)(thermometers in breath testing simulator required to be traceable to NIST).

All of the tubes must be placed on a circular rack into the instrument. A syringe withdraws a sample of the air in the headspace of the small vial to inject into a column. The column is the thickness

of a human hair and can be as long as thirty meters. David T. Stafford, Ph.D., *Forensic Capillary Gas Chromatography*, Forensic Science Handbook, Vol. II, at 46 (Richard Saferstein ed., Prentice Hall 1988). The sample is mixed with pure helium or some other inert gas. *Id.* at 47. When it exits the column, it passes through a device known as a flame-ionization detector. Kenneth A. Rubinson and Judith F. Rubinson, *Contemporary Instrumental Analysis*, at 688 (Prentice Hall 2000). By the production of ions, the detector measures in millivolts how much of substance is present, and how long it took for the substance to travel through the column. A computer then produces a graph and by operation of a sophisticated computer program determines the concentration. The analyst can control the temperature, the injection time, equilibration time, time and speed of shaking of the vial, temperature of the oven and of the transfer line, volume, pressure and time of the sample injection. "Any weak link in the chain of procedure casts doubt upon the accuracy of the test results." Nichols and Whited, at p. 23-54, § 23:12; *see, generally*, Taylor and Oberman at 554-55 (6th ed. Aspen 2006); David T. Stafford, *Chromatography*, Principles of Forensic Toxicology, 89-116 (2nd ed., Barry Levine, ed. AACC Press 2003).

According to Nichols and Whited:

> For the results of the test to have sound evidential value, accurate determination of all of the following variables is critical:

- Calibration of the automatic pipets
- Calibration of the gas chromatograph
- Calibration of the sampling syringe
- Amount of water in each ethanol standard
- Amount of ethanol in each ethanol standard
- Amount of water in the internal standard
- Amount of n-propanol in the internal standard solution
- Amount of blood added to each flask
- Height of peaks on strip recording
- Time of peaks on strip recording
- Temperature of water bath

For the results of the test to have sound evidentiary value, the following variables must be held constant throughout the test:

- Rate of flow of the carrier gas
- Speed of paper on the strip recorder
- Temperature of water bath (headspace only)
- Temperature of sampling syringe (headspace only)

Nichols and Whited at 23-26.

There are a number of ways an erroneous result can occur.

> [P]rocedures incorporating internal standards reduce the likelihood of error in such analyses. However, the entire procedure is dependent on the accurate preparation of standard solutions and preparation of a standard curve or determination of the response factor of the instrument *on the day of the analysis.*"

Erwin at 17-35. "If the volume ratio of blood to internal standard is not accurate, the result will be incorrect." *Id.* at 17-36. If the blood is contaminated, or if ethanol is created by the action of micro-organisms in the tube, the result can be inaccurate. *Id.*; *see*, Chang & Kollman, *The Effect of Temperature on the Formation of Ethanol by Candida Albicans*, 34(1) Blood, J. Forensic Sci. 105 (1989). Changes in the conditions of the analysis including temperature, flow rate, the condition of the column, or substances still eluting in the column from a previous analysis can impact the result. Erwin at 17-36. If the temperature is too high or too low during the equilibration phase, the mixture resulting in the headspace could be too high or low in ethanol, causing a false reading. *Id.* at 17-37.

All of the complex elements of a blood alcohol test are subjects for cross-examination. When a non-testing technician is allowed to testify to the results, he is not only testifying to the results – he is also

testifying that each and every step required to produce an accurate and reliable result was properly performed, even though he has no personal knowledge. In this way, blood alcohol test results produced by a gas chromatographic method are hearsay. The procedures followed by the nurse who withdrew the blood and the technician who ran the test are highly complex, and proper performance is necessary for an accurate and reliable result. The computation done by the computer in the gas chromatograph is also extremely complex. The test results should not be admitted in evidence without the testimony of the nurse who withdrew the blood, and the technician who performed the test, both of whom must be subject to cross-examination.

As was detailed above, the process by which blood is collected, transported, stored, and analyzed is incredibly complex and sophisticated. An accurate and reliable test is dependent upon the proper training of the nurse who withdrew the blood and the analyst who tested it. The process is one which is fraught with opportunities for error that can only be fleshed out in the crucible of cross-examination. As the Supreme Court stated in *Crawford*:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by

> testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Crawford, 541 U.S. at 61.

In a case such as this, the blood test evidence is almost the *sole* evidence of impairment, and is the *only* evidence of the per se element. In light of the above, the Petitioner should have been afforded the right to cross examine the blood technicians who actually ran the tests in order to determine if the test was truly accurate and reliable.

IV. Cases and news stories contain numerous examples of incompetence, neglect, accident, and fraud, with respect to scientific evidence, which could only be fully uncovered with the aid of cross-examination.

Just this past November, the Washington Post headline read: *FBI's Forensic Test Full of Holes, Lee Wayne Hunt is one of hundreds of defendants whose convictions are in question now that FBI forensic evidence has been discredited*, Washington Post, Nov. 18, 2007. Unfortunately, the case law and news are replete with examples of negligence, incompetence, accident, and fraud in crime laboratories across the country. John F. Kelly & Phillip K. Wearne, *Tainting Evidence: Inside the Scandals at the FBI*

Crime Lab (The Free Press 1998); Rod Ohira, *FBI Tip Prompts Audit of HPD Serology Lab*, Star Bulletin, September 9, 2000; *Scientist's Cases under Review After DNA Clears Man*, CNN.com, December 15, 2002; *When a Lab Gets It Wrong*, The Washington Post, June 15, 1997; Steve Mills and Maurice Possley, *State Crime Lab Fraud Charged*, Chicago Tribune, January 14, 2001; Maurice Possley and Steve Mills, *Crime Lab Disorganized, Report Says*, Chicago Tribune, January 15, 2001; James Ewinger, *Lab Practices Questioned*, The Plain Dealer, August 18, 2000; Ruben Castaneda, *Drug Case Dropped After Ruling on Lab*, The Washington Post, November 23, 1999; *Hundreds of Drug Cases May Be in Jeopardy*, Dallas Morning News, July 19, 1996; U.S. Department of Justice, Office of the Inspector General, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases*, April 1997; John Solomon, *FBI Lab Problems, New Allegations Target DNA, Bullet Analysis at FBI Lab*, Associated Press, April 15, 2003; *Fed: Private Labs Fake Environmental Experiments, Jeopardize Enforcement*, Associated Press, January 22, 2003.

This list of news stories simply represents the tip of the iceberg. There is no monopoly on fraud, incompetence, negligence and accident in government or private laboratories. A rule that allows the breath and blood test technicians to testify by affidavit without cross-examination ignores the reality that in many cases the information on which such affidavits are based is flawed in some way and that the defendant is being denied an opportunity to develop and present a

defense.

Based on the above cited law and argument, the questionable reliability of chemical test evidence in drunk driving cases, combined with its heightened importance to the determination of guilt or innocence, and the many foundational facts proven and placed at issue when a simple affidavit is accepted in evidence, the Confrontation Clause requires that the defendant be afforded an opportunity to cross-examine the Government's blood test technicians in order for the fact-finder to properly weigh the accuracy and reliability of the test result. Accordingly, the trial judge erred in admitting the blood test into evidence in the instant case.

V. The Supreme Court's due process cases have assumed the ability to cross-examine breath and blood test technicians.

The Supreme Court recognized in *California v. Trombetta*, 467 U.S. 479 (1984), that the state need not preserve potentially exculpatory breath samples because there were other ways for the defendant to prove his innocence. The Court said:

> Even if one were to assume that the Intoxilyzer results in this case were inaccurate and that breath samples might therefore have been exculpatory, it does not follow that respondents were without alternative means of demonstrating their innocence.

Respondents and amici have identified only a limited number of ways in which an Intoxilyzer might malfunction: faulty calibration, extraneous interference with machine measurements, and operator error. See Brief for Respondents 32-34; Brief for California Public Defender's Association et al. as Amici Curiae 25-40. Respondents were perfectly capable of raising these issues without resort to preserved breath samples. To protect against faulty calibration, California gives drunken driving defendants the opportunity to inspect the machine used to test their breath as well as that machine's weekly calibration results and the breath samples used in the calibrations. See supra, at 2530. Respondents could have utilized these data to impeach the machine's reliability. As to improper measurements, the parties have identified only two sources capable of interfering with test results: radio waves and chemicals that appear in the blood of those who are dieting. For defendants whose test results might have been affected by either of these factors, it remains possible to introduce at trial evidence demonstrating that the defendant was dieting at the time of the test or that the test was conducted near a source of radio waves. *Finally, as to operator error, the defendant retains the*

> *right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise doubts in the mind of the fact-finder whether the test was properly administered.*

Id. at 490 (emphasis added). Thus, one of the underpinnings of the *Trombetta* decision was the defendant's ability to cross-examine the breath test operator to establish operator or machine error, a result now under attack under some jurisdictions' interpretation of *Crawford*. Courts cannot conclude that the Government need not produce the blood or breath test technicians for cross-examination and remain faithful to the guarantee of the right to a fair trial described by the Supreme Court in *Trombetta*.

This Court should grant certiorari to guarantee that if there are to be flaws in the process by which a defendant's conviction is obtained, the inability to examine the witnesses against him is not one of them.

CONCLUSION

For the reasons stated, this Court should grant O'Maley's Petition for a Writ of Certiorari.

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