IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 87902
	)	
ROBERT MARCH,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BUTLER COUNTY, MISSOURI
36th JUDICIAL CIRCUIT
THE HONORABLE MARK L. RICHARDSON, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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REPLY ARGUMENT

I.

The trial court erred in overruling defense counsel's objections and admitting into evidence Dr. Briner's lab report (Ex. 8) and the testimony of Pam Johnson regarding the contents of Dr. Briner's lab report because the admission of this evidence violated Mr. March's right to confrontation guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that Dr. Briner's lab report and Pam Johnson's testimony regarding the lab report constituted testimonial hearsay regarding the content and quality of the key evidence (drugs) seized at the crime scene, but Dr. Briner was not shown to be unavailable to testify at trial and defense counsel had no prior opportunity to cross-examine Dr. Briner.

As fully presented in both Appellant's opening brief and Respondent's brief, the question of whether laboratory reports constitute testimonial hearsay for purposes of Confrontation Clause analysis currently occupies the dockets of numerous state and federal courts. The divergence of opinion in both venues is deeply fractured. Given this divide, the United States Supreme Court appears poised to grant a pending petition for certiorari on this exact question in *Pinks v. North Dakota*, Docket #06-564. Paraphrased, the question presented by the *Pinks* petition is whether a crime lab report may be used as a substitute for the forensic examiner's live testimony at trial. Appellant believes that a grant of certiorari review in *Pinks* is imminent for three reasons:

First, Petitioner's counsel of record is none other than Jeffrey Fisher, the attorney who petitioned for review and argued both *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 126 S.Ct. 2266 (2006). Second, the Pinks petition sets forth the deep split within the state and federal courts, and presents a persuasive argument as to why the high court must intervene now to resolve the issue. For this Court's convenience, the Pinks petition is available for review at the following link: http://www.scotusblog.com/movabletype/archives/Pinks%20Final%20Final.pdf Finally, on November 29, 2006, the United States Supreme Court ordered the State of North Dakota, (which had previously waived a reply), to respond to Pinks' petition, indicating the Court's interest in the case. North Dakota's response is currently due on December 29, and it appears that the Court may re-conference the petition in mid-January or February.

If certiorari had been granted already, Appellant would recommend holding this case in abeyance; however, since review is not conclusively certain, there are two additional reasons why this Court need not wait for additional guidance regarding this important constitutional question. First, in addition to *Crawford* and *Davis*, there are other United States Supreme Court cases which will guide this Court's decision. These cases reveal the traditional view that a defendant has a right to confrontation with forensic examiners regarding their reports. Second, this Court has very recently begun the process of re-evaluating Missouri's approach to confrontation law to bring it into accord with the new paradigm ushered in by *Crawford* and *Davis*. See *State v. Justus*, 2006 Mo. LEXIS 136, SC87604 (Mo. banc, November 21, 2006). The test set forth by

this Court in *Justus* is easily adapted to testimonial statements contained in crime lab reports, and such test would provide a coherent approach for litigants and courts to apply to business records that are also testimonial, such as the lab reports here.

Reports of Forensic Examiners Traditionally have been Subjected to Confrontation[1]

Although the United States Supreme Court has yet to squarely decided this issue, it has explicitly assumed on several occasions that, absent a defendant's stipulation, the prosecution may not introduce a crime laboratory report as a substitute for presenting live testimony from a forensic examiner. As early as 1912, the Court stated that certain pretrial "testimony" including an autopsy report "could not have been admitted without the consent of the accused . . . because the accused was entitled to meet the witnesses face to face . . . ." *Diaz v. United States*, 223 U.S. 442, 450 (1912). Years later, the Court noted that when the government performs "scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like[,] . . . the accused has the opportunity for a meaningful confrontation of the Government's case at trial." *United States v. Wade*, 388 U.S. 218, 227-28 (1967). Similarly, in refusing to recognize a due process right to have the government preserve breath samples, the Court observed that "the defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise doubts in the mind of the

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[1] A substantial portion of this information regarding the history of the Confrontation Clause in relation to forensic reports is taken from the petition for certiorari in *Pinks v. North Dakota, supra*.

factfinder whether the test was properly administered." *California v. Trombetta*, 467 U.S. 479, 490 (1984). These statements from the United States Supreme Court make sense because state crime laboratory reports "bear testimony," and they cannot – over a defendant's objection – act as a substitute for presenting the live testimony of a forensic examiner at trial.

However, following the (now defunct) case of *Ohio* v. *Roberts*, 448 U.S. 56 (1980), which conflated the Confrontation Clause with hearsay law, many states began to label crime lab reports as "business records," thereby rendering them admissible under the Confrontation Clause in place of the live testimony of the examiner. *See* Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 508 & n.165 (2006). Even in jurisdictions that resisted characterizing crime laboratory reports as business records, many legislatures enacted laws specifically making such reports admissible in the prosecution's cases-in-chief in lieu of live testimony. *See id.* at 514 & n.204. This practice raised serious constitutional questions even during the *Ohio v. Roberts* era. *See, e.g.*, Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 Ohio St. L.J. 671, 674-75 (1988). And these questions have become even more significant in the wake of the Court's clarification in *Crawford* v. *Washington*, 541 U.S. 36 (2004), that "testimonial" hearsay cannot be introduced against defendants in lieu of live testimony.

A Crime Lab Report Admitted as a Business Record is Quintessentially Testimonial

In his opening brief, Appellant provided several reasons why the laboratory report constituted testimonial hearsay under the definitions set forth in *Crawford* and *Davis*.

The report attests to Dr. Briner's findings and it functioned as the equivalent of his testimony on the identification and weight of the substance seized from Mr. March's residence. The report was prepared at the request of law enforcement for the prosecution of Mr. March, and it was offered at trial specifically to prove an element of the crime for which he was charged. And the purpose of the report's preparation was to nail down the truth about past criminal events.

In response, Respondent suggests that a crime lab report should not be considered testimonial because: 1) the report is a business record and falls under the hearsay exception in §490.680; and 2) the report is neutral, objective, and therefore, reliable (Resp. Br. 24-25, 29-32). This Court should not be persuaded by these arguments.

Section 490.680 is Subject to the Parameters of the Confrontation Clause

First, as the Court emphasized in *Crawford,* the reasons for subjecting testimonial statements to confrontation procedures "do[] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." 541 U.S. at 56 n.7. Jurisdictions may not insulate state crime laboratory reports from scrutiny by labeling them "business records." The primary question is whether the statutory hearsay exception comports with the Confrontation Clause. This Court recognized this when, in *Justus, supra*, it determined that the application of Section 491.075 – which allows for the admissibility of certain hearsay statements made by a child under fourteen – is subject to the Confrontation Clause. *State v. Justus*, 2006 Mo. LEXIS 136, *12.

Furthermore, *Crawford*'s reference to "business records" does not support the labeling of forensic laboratory reports as nontestimonial. Many commentators believe that the "business records" to which the *Crawford* Court averted in dictum, were in reference to the common law "shop book rule" exception for regularly kept business records, *see* 541 U.S. at 56, and did not remotely encompass reports generated for prosecutorial use. *See Palmer* v. *Hoffman*, 318 U.S. 109, 113-14 (1943) (explaining that records "calculated for use essentially in the court" or whose "primary utility is in litigating" fall outside of the common law rule, and declining to expand the federal exception to allow their admission); See *State v. Miller*, __ P.3d at ___, 2006 WL 2820978, at *7-8 (Ore. App., decided October 4, 2006) (tracing the history of the business records exception and concluding that state crime laboratory reports fall far outside historical exception). The *Miller* court explained that the forerunner of the business-records exception, the "shop book rule," as construed by the Supreme Court in *Palmer v. Hoffman, supra*, would not have encompassed documents prepared for litigation, such as the lab report in this case.

This historical perspective explains the distinction between cases referenced by Respondent, such as *State v. Powell*, 648 S.W.2d 573 (Mo. App., E.D. 1983) – wherein cash register tape showing daily shortages or excesses of each register were kept daily in the ordinary course of business even though their use in litigation, in the event of a robbery, could also be anticipated – and cases involving records that are prepared at the request of law enforcement and for the purpose of providing forensic evidence to the judicial system, such as the lab report here.

At this point, it is important to note that the website referenced at page 32 of Respondent's brief is not that of the Southeast Missouri Regional Crime Lab as Respondent asserts; rather, Respondent's footnote 11 give the citation to the website of the Missouri State Highway Patrol Crime Laboratory. Although Respondent quotes one of the MSHP lab's goals, the more important quotation comes from its mission statement:

> Its purpose is to provide superior forensic science services and technical support to all local, county, state, and federal law enforcement agencies by utilizing state-of-the-art equipment and techniques and to present objective, unbiased conclusions to the judicial system.

http://www.mshp.dps.mo.gov/MSHPWeb/PatrolDivisions/CLD/GeneralInformation/MissionStatement.html. There is no question that crime labs, whether affiliated directly with law enforcement or not, exist to serve as an arm of law enforcement and to facilitate the prosecution of crime by providing evidence for trial. Indeed, if this Court links to the correct citation for the Southeast Missouri Regional Crime Lab, it will find that SEMO describes its mission as:

> vital to the law enforcement community in a 20-county service region. The lab provides testing for drugs, ballistics examinations, blood/body fluids, serology, trace evidence, arson, fingerprints, alcohol in blood, urine toxicology and DNA.

http://www.semo.edu/cosm/programs/crimelab.htm. According to at least one Assistant U.S. Attorney for the Eastern District of Missouri, "SEMO Crime Lab is unquestionably a key component for local law enforcement to prosecute felons in

southeast Missouri." http://bond.senate.gov/atwork/recordtopic.cfm?id=204283. It is clear that the primary purpose of the investigation by the SEMO examiner was to assist law enforcement in establishing past events for later use in the criminal prosecution of Mr. March, and the statements contained in the report are testimonial. This is the thrust of the test that this Court recently handed down in *State v. Justus*, *supra*, and it should be applied in this context as well.

Applying this test would put this Court in the company of numerous other courts (including two other state courts of last resort) which have used similar reasoning explicitly to hold that such lab reports are testimonial. *See State* v. *Caulfield*, ___ N.W.2d ___, 2006 WL 2828676, at *3-4 (Minn. Oct. 5, 2006) (state forensic examiner's report identifying substance as an illegal drug is testimonial because it is "clearly prepared for litigation" and "function[s] as the equivalent of testimony on the identification of the substance seized from [the defendant]"); *City of Las Vegas* v. *Walsh*, 124 P.3d 203, 208 (Nev. 2005) (nurse's affidavits authenticating and outlining standard blood-testing procedures are testimonial because "they are made for use at a later trial or legal proceeding"), *cert. denied*, 126 S. Ct. 1786 (2006); *State* v. *Miller*, ___ P.3d ___, 2006 WL 2820978, at *1 (Or. Ct. App. Oct. 4, 2006) (urinalyses and drug residue analysis reports are testimonial because they are solemn declarations "clearly intended to be used in a criminal prosecution to prove past events"); *State* v. *Rogers*, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004) (blood test was testimonial because it was "initiated by the prosecution and generated by the desire to discover evidence"); *Martin* v. *State*, ___ So. 2d ___, 2006 WL 2482442 (Fla. Dist. Ct. App. Aug. 30, 2006) (drug analysis

report)[2]; *State* v. *Berezansky*, 899 A.2d 306, 312-13 (N.J. Super. Ct. App. Div. 2006) (laboratory report analyzing blood-alcohol content); *People* v. *Lonsby*, 707 N.W.2d 610 (Mich. Ct. App. 2005) (laboratory report testing for presence of semen), *motion for appeal denied*, 720 N.W.2d 724 (Mich. 2006); *State* v. *Crager*, 844 N.E.2d 390 (Ohio Ct. App. 2005) (DNA test), *appeal allowed*, 846 N.E.2d 533 (Ohio 2006).

Two other courts have suggested they agree with this view. *See United States* v. *Rahamin*, 168 Fed. App'x 512, 520 (CA3 2006) (noting drug analysis report "appear[ed] testimonial" but resolving case on harmless-error grounds); *United States* v. *Magyari*, 63 M.J. 123, 127 (C.A.A.F. 2006) (unpublished opinion) (holding a random, administrative urinalysis report is nontestimonial but noting "the same types of records . . . prepared at the behest of law enforcement in anticipation of a prosecution" may be testimonial). Finally, the New Hampshire Supreme Court has also ruled that introducing a crime laboratory report purporting to establish the presence of a controlled substance without live testimony of the forensic examiner violates a defendant's confrontation rights. *See State* v. *Coombs*, 821 A.2d 1030, 1032 (N.H. 2003). Although the New Hampshire

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

Supreme Court issued its decision before *Crawford*, it drew heavily on Justice Thomas's concurrence in *White* v. *Illinois*, 502 U.S. 346, 363 (1992), which first advanced the testimonial concept, and reasoned that "a laboratory test used to prove an essential element of a criminal offense constitutes [the type of] *ex parte* affidavit" that the Confrontation Clause was designed to cover. *Coombs*, 821 A.2d at 1032. This Court is certainly not alone in the analysis it has adopted for "testimonial" hearsay.

The Alleged Reliability of Scientific Evidence is not Sufficient for its Admission

Finally, Respondent urges that Dr. Briner's laboratory report is not testimonial because it is "objective," "routine" and, therefore, "reliable." (Resp. Br. At 30-32). But reliance on the supposedly "inherently trustworthy and reliable [nature of] scientific testing," see *Pruitt v. State*, ___ *So. 2d* ___, 2006 WL 1793732 *5 (Ala. Crim. App. June 30, 2006), is nothing more than a restatement of the rejected approach taken in *Ohio v. Roberts*. Even assuming Respondent's assessment of the reliability of scientific testing is correct, the United States Supreme Court rejected this reasoning in *Crawford*:

> Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Crawford, 541 U.S. at 62. Trial courts must require testimony to be presented through the adversarial process, regardless of whether they surmise that cross-examination will likely bear fruit. *Id.*

As pointed out in the Pinks petition, the unchecked use of state crime laboratory reports in place of live testimony undermines the integrity of the criminal justice system.

Recent reports have shown that "tainted or fraudulent science" contributes to a large proportion – perhaps one-third – of wrongful convictions. See Barry Scheck et al., *Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted* 246 (2000); see also Metzger, 59 Vand. L. Rev. at 491-500 (detailing numerous examples). In Appellant's opening brief, he detailed recent problems that have been uncovered in Missouri state crime laboratories.

Studies have shown that some crime laboratories use undependable protocols. One study revealed that 30% of state forensic examiners asked to test a substance for the presence of cocaine rendered incorrect results. See U.S. Dep't of Justice, Project Advisory Committee, Laboratory Proficiency Testing Program, Supplementary Report – Samples 6-10, at 3 (1976). Even the FBI's most sophisticated laboratories have been plagued by startling error rates. See Paul C. Giannelli, *Ake v. Oklahoma*: The Right to Expert Assistance in a Post-*Daubert*, Post-DNA World, 89 Cornell L. Rev. 1305, 1320 (2004) (describing a 1997 report by the Department of Justice Inspector General).

A review of the lab report in this case reveals its largely conclusory nature (Ex. 8, Appendix A-1). In its entirety, the report consists of just over one-half page. It does not describe the qualifications or experience of the forensic examiner. It does not indicate whether any recordkeeping or storage measures were taken to preserve the integrity of the items for testing. The report identifies the name of the tests, but does not document the method used by the examiner to arrive at his conclusions regarding the weight or the substance of the material. What the report does provide, however, is what the

prosecution needed: a "solemn declaration" from a state forensic examiner that Mr. March possessed an illegal drug.

The reality is that forensic examiners' make mistakes and some may be prone to subconscious or even willful bias toward the prosecution. Therefore, their evidentiary certifications must be subjected to the ordinary processes of direct and cross-examination. If these examiners are aware that they may have to present and defend their work in front of judges and juries in open court, they are more likely to be careful and conscientious. And when mistakes or misconduct occur, the adversarial process is more likely to uncover the truth.

This is not a terrible burden, and this Court should not be misled by Respondent's ominous predictions. Respondent argues that this Court should not ignore the "practical implications" that would follow from treating laboratory reports as testimonial (Resp. Br. 33). But the "practical implications" of requiring live testimony, or a prior opportunity for cross-examination, are far from burdensome. Indeed, this is how many criminal trials proceed day in and day out around the state. In fact, state examiners anticipate the necessity of their presence at trial - on the face of the lab report it states, "If court testimony is required, please notify the examiner whose name appears above as soon as possible." (Ex. 8; Appendix A-1). Examiners know that their presence is necessary at trial and societal interests are well-served by a system that guarantees the reliability of its scientific testing in the crucible of cross-examination. Furthermore, the necessary destruction of certain hazardous evidence does not implicate the examiner's ability to

relate to the fact-finder how the evidence was tested before it was destroyed, what procedures were used, and what results were obtained.

State crime laboratories operate as an arm of law enforcement – it is their stated mission to assist law enforcement in presenting evidence in the judicial system. The routine and primary purpose of their investigative testing is to establish or prove past events potentially relevant to later criminal prosecution. As such, the statements and conclusions of these forensic examiners, like Dr. Briner, constitute testimonial hearsay. Because Dr. Briner was not shown to be unavailable and because defense counsel had no prior opportunity to cross-examine him, his laboratory report should not have been admitted at trial, regardless of whether it was admissible under the business records statute. This Court must reverse and remand for a new trial, where the State may either: 1) call Dr. Briner as a witness, allowing him to be cross-examined regarding his testing of the evidence; or 2) have the evidence retested by another analyst, such as Ms. Johnson, who will then be available to testify at trial regarding her findings.

CONCLUSION

Because the trial court allowed the admission of testimonial hearsay in the form of a laboratory report, the preparer of which did not appear at trial and had not been subjected to prior cross-examination, in violation of Mr. March's right to confrontation (Point I), and because the trial court failed to declare a mistrial when the State elicited evidence that Mr. March was "a woman beater," which amounted to an uncharged crime unrelated to the crime for which he was on trial (Point II), Mr. March respectfully requests that this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Amy M. Bartholow, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2003, in Times New Roman size 13-point font. According to MS Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this brief contains **3,890** words, which does not exceed the 7,750 words allowed for appellant's reply brief.
- ✓ The floppy disc filed with this brief contains a copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which is updated every month (i.e., last updated in November, 2006). According to that program, the disc is virus-free.
- ✓ True and correct copies of the attached brief and floppy disc were hand-delivered this 4th day of December, 2006, to Lisa Kennedy, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

_____
Amy M. Bartholow

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APPELLANT'S APPENDIX
